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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR

VOL. VII DECEMBER, 1934 No. 2

LEGAL MEDICINE*

ALBERT J. HARNO**

I shall begin my story by telling you, my brethren of the bar, that I have suffered long and have been the recipient of much abuse because of my profession. My lay friends have hurled many invectives at me. Scarcely even do I go among them when I am not subjected to a cross-fire of questions which appear to me to imply that lawyers are quite beyond the pale of human decency, and that I myself am the embodiment of the profession. You may never have suffered as I have and you, in your established positions, probably never have experienced such contumelious receptions. For me it is not unusual to spend an hour or an evening answering questions such as these: "Should a lawyer defend a man whom he believes to be gulity?" "Does not the lawyer lay all the impediments he can in the way of those attempting to convict the guilty?" "Is he not always attempting to twist and confuse the facts?" "Does the lawyer connive in guilty knowledge with his client?" "Does he not coach his client in lies to the end that the client may escape the halter of the law?" "Does the prosecuting attorney ever seek to convict persons of wealth and influence?" "Let a poor friendless waif fall into his hands, is he not as eager to convict the innocent as the guilty?" "Why does the law refuse to employ scientific methods in crime detection?" "Why does it not let the psychiatrist speak his mind?" Why does it cling to outgrown formulas on the tests of insanity?" "Having in mind the way the guilty escape conviction in our cities, would you not advocate vigilantes and lynchings?" And so *ad infinitem*.

This is the popular attitude toward the profession and so it has been for time without end. There comes to my mind a bit of old verse:

*The substance of this paper was presented before the Illinois State's Attorneys' Association at its meeting on December 29, 1933.

**Dean of the Law School, University of Illinois.

"Sanctus Ivo erat Brito
Avocatus sed non latre—
Res mirando populе."

which translated reads, "Saint Ivo was a Brittany lawyer but not a robber—a wonder to the people."

St. Ivo, according to an old story, was permitted by the Pope, on the petition of the lawyers, to choose a patron saint for them. The ceremony was performed in this way. St. Ivo was to be blindfolded and thus to be permitted to feel his way among the statues in the Lateran. According to the conditions set, the saint whose statue he embraced would become the patron saint of the lawyers. Whereupon St. Ivo was blindfolded and set upon his assignment, groping his way about. He felt of this statue and that until he came to the one of St. Michael overcoming Satan. Then, to the consternation of all, he threw out his arms and embraced the statue of Satan, who forthwith, according to the clergy, became our patron saint. If it be true that one can accurately judge a people by their gods, we may have in the story of St. Ivo's choice a correct measure of the legal profession. But I must tread softly lest I give offense.

In venturing some remarks on legal medicine, I shall endeavor to point out how medicine may be employed to become a more effective aid in combating the menace of crime. By using the word "medicine" I do not mean to confine my thought to the restricted sense in which the word is commonly used. I am using the word in a more general sense to include various scientific aids which are being employed by, and which are available to law-enforcing agencies for the better administration of criminal justice.

It is characteristic of the law that it is slow to adapt itself to the spirit of change which is ever present in the world about it. No one, I take it, would soberly contend that the law should change with every passing fad or that it should turn a credulous ear to every new economic, social or scientific theory as it is advanced. Let there be no alarm or apprehension; it is quite unlikely that the law will be carried away by seductive voices. If fault there is it lies in the fact that the law errs on the side of fixedness and not on that of fluidity. The law has been slow in recognizing that each subject of knowledge passes imperceptibly into others and that no subject is self-sufficient and absolute. "Thus it is that the physicist is learning from the chemist, the zoologist from the botanist, the economist from the statesman and the student of social science, the physician from the psychologist, and so on interchangeably and indefinitely." Mr. Justice Cardozo has expressed the belief that something of

this concept of continuity of knowledge is making its way into the law. He cites the experience of the New York court where at one session they had had, "One case where a wise decision called for the wisdom of a chemist; another for that of one skilled in the science of mechanics; another for that of the student of biology and medicine; and so on down the list."[1]

One must not conclude that there is no change in the law, for that would be quite erroneous. Movement there has been, but as a rule it has come fitfully and often there have been long static periods. Also courts are giving more recognition today to the view that the laws are not to be considered "in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions as revealed by the labors of economists," students of the social sciences and of the physical sciences. The profession, in the words of Mr. Justice Cardozo, turns "at times to physiology or embryology or chemistry or medicine—to a Jenner or a Pasteur or a Virchow or a Lister as freely and submissively as to a Blackstone or a Coke."[2]

This view, indeed, involves a changed conception of the nature and function of law, and it has made slow progress. A considerable portion of the profession still looks upon the law as an isolated and esoteric body of principles. Many lawyers have not yet perceived that law is inseparably interwoven with the economic, political and social elements of our institutions; that it, in fact, touches all phases of life; and that it is the function of law-making agencies to coordinate the intellectual contributions of other agencies into dynamic and constructive programs.

How slowly the profession is availing itself of these intellectual contributions of other learned professions can well be illustrated by calling attention to the legal tests employed when insanity is raised as a defense in a criminal case. The opinion of the judges in *McNaghten's* case was given in 1843. It probably represented some of the best thought of that day. Today all states of this country, with the possible exception of one, still hold to the test laid down in that case. Twenty-nine states hold it to be the only test. Seventeen add the test of irresistible impulse. This notwithstanding the fact that scientists learned on the human mind and its abnormalties have insisted for two generations or more that the test in *McNaghten's* case is not in accord with scientific thought.[3]

So far back as 1886, Judge Somerville, an exceptionally able man, made this statement in the course of an opinion:[4]

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[1]Cardozo, Law and Literature, 74, (1930).
[2]*Ibid.*, 76.
[3]See Weihofen, Insanity as a Defense in Criminal Law, Chap. II, (1933).
[4]Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, (1887).

"The question then presented seems to be, whether an old rule of legal responsibility shall be adhered to, based on theories of physicians promulgated a hundred years ago, which refuse to recognize any evidence of insanity, except the single test of mental capacity to distinguish right and wrong—or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. The inquiry must not be unduly obstructed by the doctrine of *stare decisis,* for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the laws of the Medes and Persians, which could not be changed."

That science does supply the law with knowledge which the law assimilates is illustrated by the action of the Supreme Court of Illinois. In *Hopps v. People*[5] that Court expressly modified its previous position on the test to be applied in insanity cases, and in *People v. Lowhone,*[6] in again examining the law on that subject, it said of the *Hopps* case..

"That case was decided in 1863. Since then further advances have been made in knowledge on the subject of insanity, its various types and characteristics, and it is now recognized that there is a partial insanity known as paranoia; that a person whose mind is diseased may be rational on most subjects but be a victim of insane delusions which render him either incapable of knowing a particular act is wrong, or if he can distinguish right from wrong as to a particular act, he may be impelled to act by an irresistible impulse."

As legal thought, enriched by the learning of men in other fields, becomes clearer, we begin to see the inadequacies in old procedures. It

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[5]31 Ill. 385, (1863).

[6]292 Ill. 32, 126 N. E. 620, (1920). The Supreme Court of Mississippi follows the rule in McNaghten's case. "Where the defense is insanity, total or partial, the test of the defendant's criminal responsibility is his ability, at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right and wrong. . . . And the test is the same where the defense is that the act was the result of an uncontrollable impulse caused by any species of insanity." Smith v. State, 95 Miss. 786, 788, 49 So. 945 (1909). See also Kearney v. State, 68 Miss. 233, 8 So. 292, (1890).

is then that the law should engage in self-analysis, and with the aid of advancing thought in other branches of knowledge, it should head its course with the stream. In 1910 a committee of the New York Bar Association inquired point blank:[7]

> "Has not the time come in the development of our system of penology to relegate to the realm of the obsolete, the assumption that an insane man cannot commit a crime? In other words, ought we not to abolish the defense of insanity, and leave as the one issue to the petit jury, did the accused do the forbidden deed? If he did not, he is innocent; if he did, he is guilty, and with the state of his mind at that time the jury has nothing to do."

This presented the problem from a new angle; thought on the subject had taken a different course. Along similar trends Governor Smith in 1928 in his message to the Legislature of New York recommended that the Crime Commission conduct certain studies. "I would suggest," said he, "that the Crime Commission give careful study and consideration to a fundamental change in the method of sentencing criminals. After guilt has been determined by legal process, instead of the sentence being fixed by judges according to statute, I should like to see offenders who have been adjudged guilty detained by the state. They should then be carefully studied by a board of expert mental and physical specialists, who after careful study of all the elements entering each case, would decide and fix the penalty for the crime." Mr. Justice Cardozo, in speaking of the transformation which is in progress, states that it is the fullness of his belief "that at a day not far remote the teachings of bio-chemists and behaviorists, of psychiatrists and penologists, will transform our whole system of punishment for crime."[8]

Legal medicine in its offerings has another contribution to make to the better administration of criminal justice. It has great possibilities for service in criminal investigations. If employed to the full measure of its potential powers it could, I believe, vastly improve the efficacy of our methods and technique in searching out the criminal and in fastening on him, through competent evidence, responsibility for crime.

It is common knowledge that after crimes have been committed, the criminals, in many instances, are not caught. In fact, all too often the crime remains unsolved. Our records in the matter of catching and convicting criminals compare unfavorably with those of European countries, such as England, Germany and France. Even the casual observer must be struck with the fact that many heinous crimes are never solved.

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[7]Report of N. Y. Bar Ass'n 391, 400, (1910).
[8]Cardozo, *op. cit.*, 86.

Often the daily press features stories detailing from day to day the startling facts of brutal murder until the news value of the story is exhausted and the case is dropped from the paper, without a clue being given on the identity of the criminal. So of kidnapping, extortion, bombing, rape, arson and other crimes.

Let us consider for a moment some of the difficulties encountered by law-enforcing agencies in criminal investigations, and let us take, for example, the legal machinery which is set in motion after the finding of a dead body under circumstances giving rise to a belief that a criminal homicide is involved. In the United States, as well as in other English-speaking countries, investigations into the cause of death are generally conducted through the office of the coroner. Considerable has been said and written concerning this ancient office. It has, indeed, a venerable history. No doubt it has served, and probably still is serving a useful purpose. There can be little question, however, that it now holds an anomalous place in the administration of our law. Scientific medicine was unknown when the office was established. Today, science is in a position to render splendid service bearing on the problems which go to the coroner's office. But at this point we discover a startling situation. The office of the coroner, in other than our most populous cities, is not at all scientifically equipped. In smaller communities it is in personnel and equipment today as it was two centuries ago. And yet the coroner is one of the chief investigating officers called to determine the cause of death. In most jurisdictions of this country coroners are elective officials. In some only physicians are eligible to the office, but no knowledge which would specially equip the incumbent for his position is required. Only in a few jurisdictions, notably in Massachusetts and in the City of New York, where the medical examiner system prevails, have the laws been sufficiently changed to make modern and scientific institutions of that office. But even in those jurisdictions the investigatory work performed by the examiner is narrow in scope, so that even there need exists for institutions which would give scientific aid to investigations and studies in various fields.

Detection of crime and conviction of the criminal is one of the major problems of the day. The criminal himself is well equipped and highly organized. He has not been slow in availing himself of modern scientific aid, and he has had little to hinder him from doing so. But our law-enforcing machinery goes into action against him with the antiquated and rusty weapons of an ancient office. One has but to study the personnel and the *modus operandi* of the coroner's office and then to read and compare the illuminating chapter on "The Expert and How to Make Use of Him" in the great work on *Criminal Investigation* by

Hans Gross, vividly to perceive what a gulf exists in crime detection between what is in this country and what might be. Experiences abroad, as well as a more limited experience in this country, show what a tremendous aid science can be in criminal investigations. It is here for the asking, but our law-enforcing agencies are unable, even if they wished to do so, to make adequate use of it.

When a dead body is found many complicated questions are likely to arise. How came that person to his death? Whose corpse is it? Does the case involve suicide, accident or homicide? Immediate investigation by experts is necessary to the end that intelligent and efficient use be made of what clues there are. This can be done only by individuals who have been specially trained. The job may call for pathologists, toxicologists, microscopists, chemists, bacteriologists, pharmacologists, and others. The case may require an analysis of stains, or an investigation of the presence or absence of poison, or a study to determine whether pre-existing disease, or injury caused the death, or a comparison of a given bullet to a given wound. It is needless to state that, with noteworthy exceptions, the coroner's office is not equipped to take over these tasks. What is more, the coroner investigates only into causes of death where it has occurred under suspicious circumstances. Science, when properly called into action, can give aid, not only in this field, but also in cases involving rape, abortion, attempted poisoning, assaults, sodomy, sexual perversion, forgery, arson, bombing, and in fact, in most all cases where problems of criminal investigation are involved. For scientific investigations of this sort the state ordinarily has made no provision.

The question presented is how to change and improve the existing order so as to make use of science and of expert knowledge. The problem is two-fold. It involves, first, providing technical staffs to aid the criminal investigator, and secondly, giving the investigator sufficient training so that he will know what expert to call and when to call him. As to the latter Gross has well said it is "important for the investigating officer to know just whom he ought to apply to; i.e., what kind of expert he ought to select;" and moreover, Gross goes on to say, the investigator "must know what the expert is capable of telling him in each case, that is to say, where his knowledge begins and what are the natural limits to it." He cites an amusing incident where an officer desired to know whether a blood stain on a piece of cloth was that of a boy or a girl, and another where an officer took a stove to pieces and sent it, carefully packed, to a chemical examiner with a request for information whether bank notes had been burned in it or not.[9] Reliance, indeed on experts is desirable, but it also is desirable that there be some display

[9]GROSS, CRIMINAL INVESTIGATION (Engl. trans., 3d ed.), 102, (1934).

of intelligence as to their capabilities. Finally, the investigator must know the value of evidential material. He must know what clues to preserve and what to hand to the scientist for examination.

Our discussion so far has involved the investigator with emphasis on the fact that he should be a highly trained individual with keen powers of observation and for the assimilation of facts. But what of that important link in the chain of law administration, the policeman on the beat? His work, primarily, does not involve criminal investigations, yet it often brings him into contact with situations when at least a measure of knowledge of scientific facts is highly desirable, if not essential. So long as he is not trained, he cannot be blamed for inefficient work. The policeman should have sufficient training so that he would at least recognize the value of evidential material. He should know "that microscopy, chemistry, immunology, metallurgy, crystallography or ballistics may yield important information, and he should know where such information may be obtained. Not only should photography and other methods of human identification be available, but the policeman on a beat should know enough about their use to know when they should be used."

As to staffs of experts to aid the investigator in his work, and on whom the policeman should call for assistance when evidential material comes into his hands, experience has shown that these can best be provided if they are associated with an institution, conceived and established for these purposes. Work in that direction is in its infancy in this country, but in European countries such organizations are well-established and are functioning highly efficiently. They are called medico-legal institutes. If such institutions were to be established in this country, they could offer scientific aid of great value to coroners, medical examiners, prosecutors, courts, investigators and police. To function best they probably should become part of the machinery of criminal justice. It would be preferable to establish here, as they have been founded abroad, institutes supported and controlled by the state. An institute so organized could serve the various law enforcing agencies throughout the state. Such an agency established by the state would in no way interfere with similar organizations operated by such municipalities as can afford them. The equipment and staff of a state institute would be available to the municipalities and counties of the state.

A state medico-legal institute could thus serve the whole state in its criminal investigations. When properly conducted it could be a factor in the prevention as well as the detection of crime. In fact, the scope of service to law-enforcing agencies possible through medico-legal institutions would be tremendous. We, as a people, must be educated to the

fact that the simple devices found sufficient by our pioneers to combat crime, when there was little of it, are no longer adequate. Crime detection, today, is not an undertaking for the casually elected official. It is a life's work, a career for men scientifically trained. The medico-legal institute is an organization which, when properly conceived, offers aid in two capacities: in the training of experts and in scientific services. It is one of the strongest agencies of modern times available for combating the crime menace.

No thoughtful lawyer is likely to question the fact that science is an indispensable aid to the administration of our law. Most would, I believe, accept the view that it has potential powers far beyond those employed. It becomes, therefore, a fair question to ask why it is not used to the limit of its capacities. That is difficult to answer but I believe some of the reasons are not hard to find. I have already mentioned the out-worn and inadequate procedures which are employed through the office of the coroner. That office is a traditional one and in many states a constitutional one. Today it stands squarely in the path of expedious and progressive action in crime detection. Another reason for our inability to utilize fully scientific knowledge is to be found in the procedures governing the admission of expert testimony. Obviously, if the law is to avail itself of expert scientific knowledge, it must employ adequate procedure to bring that knowledge to bear on the administration of justice.

The restrictions in legal procedure under which the expert is required to give evidence and the methods employed in bringing his knowledge before the court and the jury have frequently been considered and condemned. The issues and the problems involved are well expressed in the following statement by Judge Learned Hand:[10]

> "The serious objections are, first, that the expert becomes a hired champion of one side; second, that he is the subject of examination and cross-examination and of contradiction by other experts. . .
>
> "The main difficulty, the fatal difficulty, is, however, still further to seek, and lies in the logical fulfilment of the expert's position, as witness and not as advisor of the jury. The result is that the ordinary means successful to aid the jury in getting at the facts, aid, instead of that, in confusing them. . . .
>
> 'The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two

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[10] *Historical and Practical Considerations Regarding Expert Testimony,* (1901), 15 HARV. L. REV. 40, 53-55.

> statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all. Even where two suppositious propositions are not in direct conflict, the real reconciling grace which may lurk between them is not bestowed, save upon one familiar with the whole line of experience to which they belong; and when the conflict is direct and open, the absurdity of our present system is apparent. The truth of either combatting proposition lies just in its validity as an inference from a vast mass of experience, not usually in any great degree that of the witnesses, certainly in no part that of the jury, as to the truth of which trained powers of observation are quite essential, the result themselves of a life of technical training. What hope have the jury, or any other layman, of a rational decision between two such conflicting statements each based upon such experience? If you would get at the truth in such cases, it must be through some one competent to decide."

Historically, three methods have been employed in bringing specialized knowledge to bear on litigation. Under the first, and perhaps the oldest, an expert or corps of experts is attached to the court. It involves an "official jury of experts where a scientific fact is in issue." This practice is old, for it is mentioned by Bracton. Today one finds scientific men, but not lawyers, advocating it. It is employed in some European and South American countries. In this country this method would interfere with the constitutional prerogatives of the jury.

The second method involves the summoning of skilled persons to advise the court. This procedure is also old, for there is record of it having been employed in 1345. But this does not solve the problem, for the "real question that arises," as Judge Hand has stated it, "is how to put at the disposal of the jury the knowledge of experts in the decision of a case."[11]

The third type consists of a procedure under which the court is authorized to call, on any issue involving specialized knowledge, an expert or body of experts selected by the judge himself. This method has numerous advocates both among scientific men and lawyers. While the proposals concerning this procedure vary in detail with the different individuals who have made them, the one which appears to be the soundest would permit either side to call experts in addition to those called by the court.[12] The advantages of this procedure have been well expressed by

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[11] *Ibid.*, 43.

[12] See Schultz, *Possibilities and Need for Development of Legal Medicine in the United States* (1932) Bul. Nat'l Research Council, No. 87, 10-19; Maguire, *Expert Testimony* (1931) 6 Encyc. Soc. Sc. 13-15; Foster, *Expert Testimony* (1897) 11 HARV. L. REV. 169; Bartlett, *Medical Expert Evidence* (1900) 34 AM. L. REV.

Mr. Wigmore:[13]

> "As soon as a clash of opinion appeared between the partisan experts, paid by the parties, the jury would turn for its real guidance to the impartial one selected and summoned by the judge, and his conclusions would have an almost decisive weight with the jury. At the same time, there would be no risk of suppressing possible truth by excluding the parties' experts; and the experts called by the parties would in fact be of service in exposing occasionally the errors of the official expert."

A statute including some of the features of this proposal was held unconstitutional by the Supreme Court of Michigan in 1910.[14] However, a more comprehensive statue was held constitutional by the Supreme Court of Wisconsin in 1930.[15] In North Carolina the Supreme Court has held that a trial judge has the inherent power on his own motion to call in expert witnesses. This practice, the court said, is "especially allowable in the matter of expert witnesses who were originally regarded as *amici curiae* and were called generally by the court."[16]

This question has received consideration by the Section on Criminal Law of the American Bar Association. It was discussed at the 1933 meeting of the Section. At the 1934 meeting of the American Bar Association, the Committee on Medico-Legal Problems[17] of the Section presented the following model statute:

> Section 1. Whenever, in a criminal case, questions arise upon which expert or opinion evidence is necessary or desirable, the court on its own motion, or on the request of either the State or the defendant, after notice to the parties and a hearing, may appoint one or more experts, not exceeding three, to testify at the trial. Such expert witnesses at the request of either party, or of the court, shall make such examination and study of the subject matter of the questions as they deem necessary for a full understanding thereof, and such further reasonable pertinent examination as either party or the court shall request. Reasonable notice shall be given each party

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1; Emery, *Medical Expert Evidence* (1905) 39 Am. L. Rev. 31; McDermott, *Expert Testimony* (1913) 47 Am. L. Rev. 35; Wigmore, *A Bill to Regulate Expert Testimony* (1914) 9 Ill. L. Rev. 353; Friedman, *Expert Testimony* (1910) 19 Yale L. J. 247; Keedy, *A Bill to Regulate Expert Testimony* (1915) 5 J. Crim. L. 643; Keedy, *Insanity and Criminal Responsibility* (1916) 6 J. Crim. L. 672; Morgan, *Medical Testimony* (1928) Bul. Nat'l Research Council, No. 64, 91-101.

[13]Evidence, 2d ed. (1923), Vol. 1, Sec. 563.

[14]People v. Dickerson, 164 Mich. 148, 129 N. W. 189, (1910).

[15]Jessner v. State, 202 Wis. 184, 231 N. W. 634, (1930).

[16]*State v. Horne,* 171 N. C. 787, 88 S. E. 433, (1916). On the status of the law see Weihofen, *op. cit.,* Chap. V.

[17]The members of that committee were as follows: Newman F. Baker, Herbert G. Cochran, R. Allan Stephens, William C Woodward, and the writer, who was chairman.

of the examination of persons, things and places, and each party may be represented at such examination. If the mental condition of the defendant at the time of the alleged commission of the offense charged is an issue in the cause, or if his physical condition is the subject of the inquiry, and the defendant is at large on bail, the court, in its discretion, may commit him to custody to be held for a reasonable period of time pending the examination by such experts.

Section 2. The court may require each expert it has appointed to prepare a written report under oath upon the subject matter such expert has examined, and such report shall be put on file with the clerk and open to inspection by either side, and under the direction of the court, or on the request of either party, it shall be read by the witness at the trial.

Section 3. At the trial of the case, either party or the court may call such expert witnesses. The fact that they have been appointed by the court shall be made known to the jury and they shall be subject to cross-examination on their qualifications and the subject of their testimony by both parties, who may also summon other expert witnesses to testify at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give expert evidence on the same subject. Where experts are summoned by the State or the defendant, they shall be permitted to have free access to the persons, things or places under investigation for purposes of examination or observation.

Section 4. If before or during the trial the court has reasonable ground to believe that the defendant is insane, or mentally defective, to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint one or more experts, not exceeding three, to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial. If, however, it decides that the defendant through insanity or mental deficiency is not able to understand the proceedings or to assist in his defense it shall take proper steps to have the defendant committed to the proper institution. If thereafter the proper officer of such institution is of the opinion that the

defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court which conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine defendant's mental condition. If after this hearing the court decides that the defendant is able to understand the proceedings against him and to assist in his defense it shall proceed with the trial. If, however, it decides that the defendant is still not able to understand the proceedings against him or to assist in his defense, it shall recommit him to the proper institution.[18]

Section 5. The compensation of expert witnesses appointed by the court shall be fixed by the court and paid by the county under the order of the court as a part of the costs of the action. The receipt by any expert witness so summoned of any other compensation than that so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation shall be unlawful and punishable as contempt of court.[19]

A measure of this nature would not wholly solve the expert testimony tangle; nothing ever will. But I believe it would straighten out some of the worst kinks. The practice we now follow has resulted in placing all such testimony under a cloud so that men of high scientific attainments "look upon the witness box as a golgotha, and disclaim all respect for the law's methods of investigation." Improvement lies in removing the partisan feature, that is, in removing the expert as a party witness, and in giving him freer reign to inform the court and the jury of general truths derived by him from his specialized experience.

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[18]Section 4 follows substantially Section 307 of the Code of Criminal Procedure of the American Law Institute.

[19]The recommendations of the committee have not received the final approval of the Section on Criminal Law.

SUIT BY A FOREIGN STATE AGAINST A STATE OF THE UNION: MONACO V. MISSISSIPPI

JAMES J. LENOIR*

The exact position of a state of the American Union in regard to its immunity from suit by a foreign state has long presented a highly controversial problem to students of American government.[1] Yet for nearly 140 years it appears to have been at most an academic question upon which statesmen and writers expressed conflicting opinions[2]—a problem of constitutional theory in which one man's reasoning was as acceptable as another's. True, various Supreme Court justices had expressed their views of the matter by way of dicta,[3] but since there was no agreement among them the problem remained as controversial as before.

The opposing views were clearly expressed by Justice Cushing and James Madison. The former made the following assertion:

> "But I conceive the reason of the thing, as well as the words of the Constitution, tend to show that the Federal Judicial power ex-

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[1]See JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION (Ed. by J. B. Scott, 1919), 42-44. See, also, 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833), 570, Sec. 1693.

[2]For one view of the question see Curtis, *Debts of the States*, (1844) 58 NORTH AMERICAN REVIEW, 109, 154: "There can be no doubt, therefore, that, by the very terms of the Constitution, a foreign state or sovereign may sue one of the United States in some court of the United States." Later Mr. Curtis served six years as a justice of the Supreme Court. Sometime after his leaving the Supreme bench his advice was sought as to the right of Great Britain to bring a suit against the State of New York. He replied "that such a suit might be brought to ascertain the liability of the State of New York to certain tribes of Indians settled in Canada." CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES (2nd ed., Revised by H. C. Mervin, 1896), 17, note 2.

[3]Counsel for the Principality of Monaco in their *Reply to the Answer of Mississippi*, cited on p. 14, the following quotation from Justice Thompson's dissent in Cherokee Nation v. Georgia, 5 Peters 1, 43 (1831): "That a State of this Union may be sued by a foreign state when a proper case exists and is presented, is too plainly and expressly declared in the Constitution to admit of doubt; . . ." In their *Brief in Support of Application for Leave to Bring Action*, plaintiff's counsel cited on p. 5, the following passage from Chief Justice Marshall's decision in Cohens v. Virginia, 6 Wheat 264, 406 (1821): "It (the Eleventh Amendment) does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these a state may still be sued." See, Chief Justice Jay, Chisholm v. Georgia, 2 Dallas 419, 473 (1793): "It is plain, then, that a state may be sued, and hence it plainly follows, that suability and state sovereignty are not incompatible."

tends to a suit brought by a foreign State, against any one of the United States."[4]

This position was denied in a much earlier statement made by James Madison in the Virginia convention for the ratification of the Constitution of the United States:

"I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant to the law of nations."[5]

Until recently there had been no case before the Supreme Court directly involving this phase of constitutional interpretation. There was, to be sure, one instance of the initiation of proceedings by a foreign state against a state of the Union.[6] On November 6, 1916, the Republic of Cuba resorted to the alleged "right" granted to foreign states by Article III, Section 2 of the United States Constitution when it filed a motion asking leave to file a bill against the State of North Carolina. On January 8, 1917, however, this request was withdrawn and the question remained a moot one until the small Principality of Monaco, covering about eight square miles of territory and having a population of less than 25,000 inhabitants, on December 18, 1933,[7] moved for leave to bring an action at law in the Supreme Court of the United States against the State of Mississippi for the payment of century old bonds long ago repudiated by the defendant state. On May 21, 1934, the Court handed down its decision.[8] Before entering upon a discussion of this particular

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[4]Chisholm v. Georgia, 2 Dallas 419, 467 (Cushing, J.). See Wilson, J., opinion in this same case.

[5]3 ELLIOTT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 533. See, also, the statement of Marshall, *ibid.*, 555-557: "I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that a sovereign power should be dragged before a court. . . .

"If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce." Alexander Hamilton seems to have been in accord with these views, see THE FEDERALIST, No. 81 (University Ed., H. B. Dawson, New York, 1867), 567. These authorities were cited in the *Answer of Mississippi*, 22-23. They were likewise cited with approval by Chief Justice Hughes in Monaco v. Mississippi, 78 L. ed. 1282, 1286-87 (1934). See, also, the view of Iredell, J., Chisholm v. Georgia, 2 Dallas 419, 435-436 (1793); Bradley, J., Hans v. Louisiana, 134 U. S. 1 (1890); Taney, C. J., Bank of Washington v. Arkansas, 20 How, 530 (1857); Waite, C. J., United States v. Diekelman, 92 U. S. 520, 524 (1875)—"A sovereign cannot be sued in his own courts without his consent."

[6]Republic of Cuba v. The State of North Carolina, 242 U. S. 665 (1917). F. R. Coudert and H. T. Kingsbury served as counsel for Cuba, they were also counsel for the Principality of Monaco in its suit against Mississippi. See, also, SCOTT, CONTROVERSIES BETWEEN STATES (1919), 42-43.

[7]See *New York Times*, December 19, 1933.

[8]78 L. ed. 1282.

case let us examine more fully the general question involved, with special attention to the arguments presented by counsel for the parties.

Article III, Section 2, the constitutional provision in controversy, reads as follows: "The judicial power shall extend . . . to Controversies between two or more States . . . and between a State . . . and foreign States . . . In all cases . . . in which a State shall be Party, the Supreme Court shall have original jurisdiction." This wording seems clear on its face. In the same section in which the Supreme Court is given jurisdiction over controversies between states of the Union it is also given jurisdiction over disputes between a state and a foreign state. It seems a fair inference that the restriction governing such suits are no more nor less in the one case than in the other. What has been the ruling of the Court with respect to its jurisdiction in controversies between states?[9]

Suits between States have been entertained by the Supreme Court from the earliest period of its history and have involved such diverse matters as boundaries,[10] the obstruction of navigation,[11] the diversion of navigable waters,[12] the polution of streams,[13] and debt contracts.[14] Although a state may not violate the spirit of the Eleventh Amendment by becoming the nominal owner of claims of its citizens against another state for the purpose of bringing suit against it in the Supreme Court,[15] it has the right to bring suit for claims which are its absolute property.

There have been two outstanding decisions of the Supreme Court involving the question of debt—*Virginia v. West Virginia*,[16] and *South Dakota v. North Carolina*.[17] In the first of these it appears that when West Virginia was created out of a part of the State of Virginia the two states entered into certain agreements in reference to the bonded indebtedness outstanding at the time of separation. Suit was brought to determine the amount due Virginia and finally a certain sum was decided upon. In its holding the Court ruled that when West Virginia entered the Union it agreed to waive its immunity from suit by another state, and that Article III, Section 2, constituted a restraint upon its

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[9]See SCOTT, SOVEREIGN STATES AND SUITS (1925); see, also, SCOTT, CONTROVERSIES BETWEEN STATES (1919).

[10]See for example such cases as Rhode Island v. Massachusetts, 12 Peters 657 (1838); New Jersey v. Delaware, 78 L. ed. 475 (1934).

[11]See South Carolina v. Georgia, 93 U. S. 4 (1876).

[12]See Wisconsin v. Illinois, 278 U. S. 367 (1929); Connecticut v. Massachusetts, 282 U. S. 660 (1931).

[13]Missouri v. Illinois and the Sanitary District of Chicago, 180 U. S. 208 (1901).

[14]See South Dakota v. North Carolina, 192 U. S. 286 (1904).

[15]New Hampshire v. Louisiana, 108 U. S. 76 (1883).

[16]There have been a series of these cases, but note particularly, 206 U. S. 290 (1907); 220 U. S. 1 (1911); 238 U. S. 202 (1915); 241 U. S. 531 (1916); 246 U. S. 565 (1918).

[17]192 U. S. 286 (1904).

sovereignty to that extent.[18] Mississippi, denying the jurisdiction of the Court over the suit brought by the Principality of Monaco, cited this case. Counsel asserted that "In controversies between states, justiciable in their nature, the consent of the states to be sued by a state is given by and at the time of its admission into the Union." Since the "Constitution is not a compact entered into between the states and foreign powers, . . . the right to sue is not reciprocal; . . . .we submit that consent to be sued must be given; . . ."[19]

A second question presented in *Virginia v. West Virginia* involved the ability of the Court to enforce its judgment. It looked for a time as if West Virginia would not pay its debt without some form of coercion, but although the Court declared that compulsion could be applied in such a case, it declined to say what the appropriate judicial action would be.[20] West Virginia finally agreed to pay the amount and the Court was freed from the necessity of further pronouncement on the matter. In *Monaco v. Mississippi,* counsel for Mississippi contended that the Court could not "coerce the payment of the bonds without violating the constitutional provisions of a sovereign state."[21] However, the plaintiff cited *Virginia v. West Virginia* to the contrary.[22]

Counsel for the Principality of Monaco relied heavily upon the case of *South Dakota v. North Carolina,* recognizing that the circumstances of the two cases were similar except that in the earlier case the action was in equity to foreclose the bonds of the State of North Carolina,[23] "while the case at bar is an action to . . . pay the principal and interest of the bonds sued on." There is little doubt but that counsel for the plaintiff followed closely in the footsteps of the Attorney-General of South Dakota both as to procedure and the substance of their argument. For this reason it seems necessary to examine the facts and holding in *South Dakota v. North Carolina.*

In November, 1901, South Dakota filed a bill of complaint against the State of North Carolina in an endeavor to secure judgment against that state for the payment of principal and interest of ten of its bonds.

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[18]See Coleman, *The State as Defendant under the Federal Constitution; The Virginia v. West Virginia Debt Controversy,* (1917) 31 HARV. L. REV., 210-245. See, also, Randall, *The Virginia Debt Controversy,* (1915) 30 POLITICAL SCIENCE QUARTERLY, 553-577.

[19]See Mississippi's *Answer to Rule to Show Cause,* 54-55.

[20]See Powell, T. R., *Coercing a State to Pay a Judgment: Virginia v. West Virginia,* (1918) 17 MICH. L. REV., 1.

[21]Mississippi's *Answer to Rule to Show Cause,* 20.

[22]*Reply of the Principality of Monaco* to the *Answer* of the State of Mississippi, 9: "The whole question of the power of the Supreme Court to enforce its decrees against a State has been crystallized in Virginia v. West Virginia."

[23]Monaco's *Brief in Support of Application for Leave to Bring Action,* 6

These bonds had been donated to South Dakota as a gift by Schafer Brothers, New York brokers who held most of the North Carolina bonds then outstanding and which had not been turned in for adjustment following the attempt of the state, in 1879, to rehabilitate its credit. In anticipation of the gift the South Dakota legislature had passed an act authorizing the acceptance of such donations from private individuals and the right of the state to bring suit to enforce collection if this should be necessary.[24]

The bonds in question had been issued in 1867 by authority of the legislature of North Carolina for the primary purpose of providing funds for the completion of the Western North Carolina Railroad, a venture in which the state had an interest by reason of the ownership of stock. In 1849, the state had chartered the North Carolina Railroad Co. with 30,000 shares of stock at $100 each, two-thirds of which were subscribed by the state. Bonds secured by the stock were issued in payment. The bonds of the second series, issued in 1867, were secured by a mortgage on the stock which the state held in the North Carolina Railroad. With each several bond a deed of mortgage for an equal amount of stock was executed and delivered.

In 1879, the credit of the state had become so poor that commissioners were appointed to call in the outstanding bonds and make an equitable adjustment. Most of the bonds had been compromised and the holders had taken losses. Schafer Brothers held the majority of the original bonds still outstanding and had given ten of these, of the 1867 issue, to the State of South Dakota. Issued for a term of thirty years they were now past due. North Carolina in its answer to the bill denied both the jurisdiction of the Court and the title of the plaintiff.

In his opinion, Justice Brewer held that South Dakota had the right to bring the suit. He cited Article III, Section 2,[25] quoting at length from the opinion of Shiras, J., in *Missouri v. Illinois,*[26] as to the history of this provision. He added that "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State."

By way of summary it may be stated that the Court has never refused to take jurisdiction in a suit between two states of the Union merely

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[24]See the discussion of this case in SCOTT, CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION, 367-390.

[25]Cf. the opinion of the Court in South Dakota v. North Carolina, 192 U. S. 286, 314, with Chief Justice Hughes' opinion in Monaco v. Mississippi, 78 L. ed. 1282, 1284-86.

[26]180 U. S. 208 (1901).

on the ground that the defendant state objected to the suit.[27] The reasoning by which the Court has asserted this jurisdiction seems to be that when the state enters the Union it consents to waive its immunity. Therefore, by virtue of being a member of the Union, the state has already consented to any suit which another state may, in the future bring against it.[28] In this way the Court reconciles its assumption of jurisdiction in such cases with the doctrine that a state cannot be sued without its consent. It would seem that it was never the intention of the framers of the Constitution that a state might be brought before the Supreme Court against its wishes.

This being the view of the Court as far as suits between states are concerned, it would seem that by analogy the Principality of Monaco could sue Mississippi without its consent unless (1) Monaco was not a foreign state within the meaning of the Constitution;[29] (2) the Court departed from the reasoning in *South Dakota v. North Carolina;* or (3) states did not consent to be sued by foreign states when they entered the Union.

Since the first point concerns the status of Monaco rather than the problem with which we are concerned, that is, the right of a foreign state to sue an American state without its consent, it is not pertinent to the present discussion.[30]

The possibility that the Court might not follow the same reasoning as in *South Dakota v. North Carolina* did not seem so remote in view of the fact that the decision in that case was by a bare majority with a strong dissenting opinion by Justice White which was concurred in by Chief Justice Fuller and Justices Peckham and McKenna. Justice White asserted that, according to the facts of the case, there was no basis for the exercise of jurisdiction by the Court.[31] He thought that the facts presented did not show a controversy between two states within the meaning of the Constitution, and that since an individual cannot enforce a claim against a state by bringing suit against it without its consent his claim may not be transferred to a state in order that it may force another state into court. Justice White asked, "How is it possible for the State

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[27]Of course, the Court will refuse jurisdiction when the cause of the litigation is not one in which the states are real parties.

[28]Counsel for Mississippi stressed this point in its *Answer to Rule to Show Cause* (*Monaco v. Mississippi*), 54.

[29]As to the present legal position of Monaco, see HALL, INTERNATIONAL LAW (8th ed., by A. P. Higgins, 1924), 29-30, note 3.

[30]However, Mississippi argued: "The Principality of Monaco is not a 'Foreign State' within the meaning of Section 2, Article III of the Constitution of the United States, and is, therefore, not authorized to bring a suit against a State of the United States." See Mississippi's *Answer to Rule to Show Cause,* 7-10.

[31]See Case Note, *Action by One State of the American Union Against Another State* (1904), 38 AMERICAN LAW REVIEW, 440-45.

of South Dakota to create a controversy by the acquisition of a claim of the class whose enforcement it was the purpose of the Eleventh Amendment to prevent?"[33] In his opinion the transferree could not receive any greater right than had the transferor. He thought that the method by which the gift was made and its acceptance by South Dakota were by their nature equivalent to a champertous engagement.

The decision in *South Dakota v. North Carolina* caused much comment at the time most of which seemed favorable to the majority view. Without passing upon the merits of either the majority or dissenting opinions we may note one comment criticizing the decision:

> "If the conclusion of the majority of the court is correct, we may yet see the spectacle of the States of the American Union buying up each other's defaulted bonds, and bringing suit thereon through attorneys employed to prosecute on contingent fees. Under the decision of the court, no road seems to be open to prevent this except the overruling of the case. Would the spectacle be seemly? Would it be decent? . . . We think not."[34]

The prediction of this critic has not materialized in the thirty years that have followed the decision.

The third point remains for discussion, namely, that upon a proper interpretation of Article III, Section 2, it cannot be said that a state of the Union consented to a suit between states and suits between a state and a foreign state as far as the jurisdiction of the Supreme Court is concerned; yet a difference exists and a foreign state may not sue a state without first securing its consent to the particular case.[35] It was upon this point that the Court actually based its decision in the *Principality of Monaco v State of Mississippi,* so before discussing it further we may consider that case.

According to the facts of the case, on September 26, 1933, Monaco was donated $100,000 of repudiated Mississippi bank bonds by "three generous persons, bondholders by inheritance"—Mary Euphemie Elliot of London, Baron Tweedmouth of London, and Giovanni del Drago of New York City.[36] The gift was similar to that of Schafer Brothers to

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[33]"Nevertheless he is allowed to revive a right of action on the dormant debt by the act of assigning it to another State of the Union which is not, by the Constitution, prohibited from suing the debtor State,—thus reaching precisely the result which the Eleventh Amendment was designed to prevent,—the suing of the States in the Federal courts upon their own debts, and the disturbing and disrupting of their fiscal arrangement." Case Note, *Action by one State of the American Union Against Another State* (1904), 38 AMERICAN LAW REVIEW, 440, 443-444.

[34]*Ibid.,* 445.

[35]See Mississippi's *Answer,* 54.

[36]See editorial "Monaco v. Mississippi," *New York Times,* December 19, 1933.

the State of South Dakota in that the donors realized their inability to bring suit against the defaulting state and therefore relinquished all claim to the bonds, in favor of the Principality of Monaco. In their letter to the Minister of State of the Principality of Monaco they said:

> "Our lawyers have advised us that there is no basis on which we can maintain a suit against Mississippi on these Bonds, but that such a suit could only be maintained by a foreign Government or one of the United States.
>
> "In view of this fact we would prefer to have the Principality of Monaco use the Bonds for such purposes as it sees fit rather than to continue to hold the Bonds ourselves."[36]

It does not appear from the facts in the instant case what amount of bonds were possessed by the donors, but one may venture the conclusion that the donation was the last resort of the foreign bond holders to collect part of the repudiated debts of the Southern States, for each issue of the Mississippi bonds were included in those donated to the Principality. A successful litigation on the part of Monaco would no doubt have led to further litigations.

Any discussion of the case necessitates a brief review of the history of the bonds in question.[37] Mississippi, about 1830, issued a charter to the Mississippi Planters' Bank for which the legislature authorized the floating of $2,000,000 of bonds which were sold principally to English investors. Several years after the creation of the first bank the state issued a charter to the Mississippi Union Bank and the legislature authorized the isssue of an additional $5,000,000 of bonds which were likewise sold, mainly to British investors. The banks became insolvent and the state soon ceased payment of interest on the bonds. Most of the leaders of the state advocated the payment of the indebtedness,[38] but, led by certain political factions, the state not only refused payment, but even went so far as to amend the State Constitution, in which it was provided that the state should not:

> "Assume, redeem, secure, or pay any indebtedness or pretended indebtedness claimed to be due by the State of Mississippi, to any

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[36] Monaco's *Motion for Leave to File Declaration and Declaration,* "Exhibit D," 57-58.

[37] See *Debts of the States,* 58 NORTH AMERICAN REVIEW, 109-145. *For a discussion* of these debts, see, also, Randolph, *Foreign Bondholders and The Repudiated Debts of The Southern States,* (1931) 25 AMERICAN JOURNAL OF INTERNATIONAL LAW, 63-82, and McGrane, R. C., *"Some Aspects of American State Debts in the Forties"* (1933). 38 AMERICAN HISTORICAL REVIEW, 673-686.

[38] See HISTORICAL SURVEY OF THE DEBTS OF THE STATE OF MISSISSIPPI REPUDIATED BEFORE THE CIVIL WAR (Report of Council of Foreign Bondholders, 54th and 55th Annual Report, London, May, 1929), 3-12. See, also, Alexander, C. C., History of State Banking in Mississippi, Master's Thesis, 1931, Library, University, Mississippi.

person, association or corporation whatsoever, claiming the same as owners, holders, or assignees of any bond or bonds, now generally known as Union Bank Bonds, or Planters Bank Bonds.[39]

This amendment was re-enacted in Section 258 of the Mississippi Constitution of 1890.[40]

There was one attempt in the courts of Mississippi by a citizen of New York to recover for bonds held.[41] Under the Mississippi statute of 1833[42] giving to an individual the right to sue the state, the Mississippi courts decided, although it would seem that judgment was never executed, that a holder of the bank bonds might sue the state. The statute was later repealed and the constitutional amendment of 1875 barred further action on the part of the bondholders.

Owners of these bonds organized in the various countries and after the repudiation made many attempts to secure their payment.[43] Since the Eleventh Amendment barred action by an individual against the state the bondholders attempted to secure action by the Mississippi legislature. Hired lobbyists and, on one occasion, a delegate from England appeared before the Mississippi legislature seeking to persuade it to make good the pledged faith of the state of Mississippi.[44] All appeals were futile; Mississippi officials either disregarded the moral obligation to pay, or decided that it would be useless for the foreign bondholders to try to collect because of the protection granted to the states by the Eleventh Amendment.[45]

However, a new phase of this old question made its appearance when, as was stated above, three bondholders, two, residents of England and one, a resident of New York, presented on September 26, 1933, Planters' and Union Bank bonds to the value of $100,000 to the Principality of Monaco. On December 18, Monaco filed a motion in the Supreme Court to sue the State of Mississippi. That tribunal then ordered Mississippi "to show cause on or before Monday, February 5th, 1934, why the motion of the Principality of Monaco for leave to file

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[39]Amendment No. 1, Constitution of Mississippi of 1876, cited by counsel in Mississippi's *Answer,* 79.

[40]See the discussion of this amendment and the constitutional provision in Mississippi's *Answer,* 79-81.

[41]State of Mississippi v. Hezron Johnson, 25 Miss. 625 (1853).

[42]Act of February 15, 1833, which is, Sec. 1, Art. 2, Ch. 54, HUTCHINSON'S CODE, 1798-1848.

[43]See Randolph, *loc. cit.,* 75-78.

[44]See *Supplemental Reply of the Principality of Monaco in Answer to the Brief of Mississippi,* "Appendix C," 34, citing MISSISSIPPI HOUSE JOURNAL, 1882, 198. See, also, comment on this by Butler, Hilton, "Mississippi Stands Unshaken on its Old Debt Repudiation," *New York Times,* December 18, 1932.

[45]"Permanent repudiation apparently is the only answer. Governor after Governor since that time has said, as did the new Governor when the touchy subject was revived: 'I have sworn to uphold the Constitution, I will!' " *Ibid.*

its declaration against the State of Mississippi should not be granted, . . . "[46] Mississippi filed an answer to the motion, denying the jurisdiction of the Court on several grounds. However, in the words of the Court, it was found necessary to deal with only one of these questions, that is, "whether this Court has jurisdiction to entertain a suit brought by a foreign state against a State without her consent. That question, not hitherto determined, is now definitely presented."[47]

Chief Justice Hughes, delivering the opinion of the Court, first examined the argument of Monaco that the absence in Section 2, Article III of any provision requiring the consent of the state in the case of a suit by a foreign state was controlling and that the Eleventh Amendment contains no reference to a suit brought by a foreign State.[48] The Court considered this argument to be inconclusive. Chief Justice Hughes pointed out that there was likewise no express provision in the Constitution that the United States may not be sued in the absence of consent. Since by Section 2, Article III, the judcial power extends "to controversies in which the United States shall be a party" one might infer from the words of the article that suits could be maintained against the United States. Yet by the established doctrine of immunity of the sovereign state from suit except upon consent, such was not the case. Citing *Williams v. United States,*[49] the Court asserted that it had "no jurisdiction of a suit by a State against the United States in the absence of consent." By a similar line of reasoning the Court did not regard its jurisdiction as extending to suits against a state prosecuted by one of its citizens.[50] Thus, it concluded "we cannot rest with a mere literal application of the words of Section 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states."

Chief Justice Hughes pointed out that behind the words of the constitutional provisions were "postulates which limit and control" that instrument. He enumerated some of these postulates; namely, that the states of the Union, still possessing attributes of sovereignty, "shall be immune from suits, without their consent, save when there has been a surrender of this immunity in the plan of the convention.' *The Federalist,* No. 81."[51] Setting this down as an essential postulate, the Chief Justice then presented the principal question for which he sought an answer; that is, "whether the plan of the Constitution involves the sur-

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[46]See *Answer* of Mississippi, 1.
[47]78 L. ed. 1282, 1284.
[48]See *Reply of the Principality of Monaco,* 18.
[49]289 U. S. 553, 573, cited by the Court, 78 L. ed. 1282, 1285.
[50]78 L. ed. 1282, 1285.
[51]*Ibid.,* 1286.

render of immunity when the suit is brought against a state, without her consent, by a foreign State."

Thus, Chief Justice Hughes looked, as did Hamilton, to the constitutional plan for an answer to the question before the Court. If it should be found that the framers of the Constitution or of the Eleventh Amendment intended that a foreign state might sue a state of the Union without that state's consent then the Court would recognize the right of Monaco to bring suit. As the debates in the constitutional convention did not disclose a discussion of the question, the Court turned to the debates in the state ratifying conventions.[52] Statements by James Madison and John Marshall in the Virginia convention to the effect that the Constitution did not pretend to deprive a state of its sovereign right of immunity from suit were quoted by the Court.[53]

The Court also quoted a lengthy passage from *The Federalist,* No. 81, in which Hamilton expressed the following view:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that [the constitutional] plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[54]

The Court admitted that the decision in *Chisholm v. Georgia*[55] was contrary to the "cogent statements of the views which prevailed when the Constitution was ratified," but, as it pointed out, there was a vigorous dissent by Justice Iredell. Moreover, the decision aroused such a strong protest that the Eleventh Amendment was at once proposed and adopted. The Chief Justice then went on to show that in *Hans v. Louisiana,*[56] a later decision involving the question of suit against a state by its own citizens, Justice Bradley criticized the holding of the majority of the Court in *Chisholm v. Georgia* and upheld the general principle of the immunity of states from suits brought against them without their consent. Justice Bradley said:

> "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the

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[52] 78 L. ed. 1282, 1286-1288.
[53] 3 ELLIOTT, DEBATES, 533, 555-556, cited in opinion, 78 L. ed. 1282, 1286.
[54] 78 L. ed. 1282, 1287.
[55] 2 Dallas 419 (1793).
[56] 134 U. S. 1 (1890).

Constitution when establishing the judicial power of the United States. . . .

"The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia;* and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agent of States."[57]

It is of interest to note that in the instant case the Court did not follow the reasoning in *South Dakota v. North Carolina,*[58] which was so often quoted in the briefs of both the plaintiff and defendant. Chief Justice Hughes passed over this case with the sole comment that it "did not disturb the ruling in *Hans v. Louisiana* or the principle which that decision applied." It "was a suit by one State against another State and did not present the question of the maintenance either of a suit by individuals against a State or by a foreign State against a State. As a suit by one State against another State, it involved a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State."[59]

Chief Justice Hughes concluded with a brief summary of the effect produced by the constitutional scheme upon the sovereign immunity of a state from suits in several distinct classes of cases. (1) The states waived their exemption from judicial power with respect to controversies between themselves when they adopted the Constitution. The jurisdiction of the Court was thus established over the parties in such cases " 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union."[60] (2) It is "inherent in the constitutional plan" that the United States may sue a state.[61] (3) The Eleventh Amendment has erected an absolute bar to suits against

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[57]Monaco v. Mississippi, 78 L. ed. 1282, 1288.

[58]South Dakota v. North Carolina, 192 U. S. 286 (1904).

[59]78 L. ed. 1282, 1288.

[60]The Court cited, 78 L. ed. 1282, 1289, Rhode Island v. Massachusetts, 12 Pet. 657, 720 (1838); Louisiana v. Texas, 176 U. S. 1, 16, 17 (1900); Missouri v. Illinois, 180 U. S. 208, 240, 241 (1901); Kansas v. Colorado, 185 U. S. 125, 142, 144 (1902); 206 U. S. 46, 83, 85 (1907); Virginia v. West Virginia, 246 U. S. 565 (1918).

[61]The Court cited United States v. North Carolina, 136 U. S. 211 (1890); United States v. Texas, 143 U. S. 621, 644, 645 (1892); 162 U. S. 1, 90 (1896); United States v. Michigan, 190 U. S. 379, 396 (1903); Oklahoma v Texas, 258 U. S. 574, 581 (1922); United States v. Minnesota, 270 U. S. 181, 195 (1926).

a state, without its consent, brought by citizens of another state or by citizens or subjects of a foreign state.[62] (4) Protected by the same principle in the Eleventh Amendment "the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment."[63]

Finally, the Court, in further application of the principle of the immunity of a state from suit without its consent, was of the opinion that a foreign state could not sue a state of the American Union without its consent. "The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan" but the Court perceived no ground upon which it could be said "that any waiver or consent by a State of the Union has run in favor of a foreign State. As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State."[64]

In support of his conclusion Chief Justice Hughes pointed out that in the case of a controversy with a foreign power a state has no prerogative of adjustment since it is forbidden by the Constitution to enter into treaties and cannot, without the consent of Congress, conclude international agreements of any other nature. He supposed the case of a "controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State" and declared that it could not be assumed to have been the intention that such a dispute "should be taken out of the sphere of international negotiations and adjustment through a resort by the foreign State to a suit under the provisions of Section 2 of Article III." Although, in the opinion of the Court, the proposed question was not one of national concern the Court considered it important to consider such a possibility.[65]

The opinion marks another milestone in the history of the Constitution and of the Supreme Court, for it definitely decided that a foreign state may not sue a state of the Union without its consent. Chief Justice Hughes undoubtedly applied a sound principle of constitutional inter-

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[62]The Court cited Chisholm v. Georgia, 2 Dall. 419 (1793); Ex parte State of New York, No. 1, 256 U. S. 490, 497 (1921).

[63]The Court cited Hans v. Louisiana, 134 U. S. 1 (1890); Smith v. Reeves, 178 U. S. 436 (1900); Duhne v. New Jersey, 251 U. S. 311 (1920); Ex parte New York, No. 1, 256 U. S. 490, 497 (1921).

[64]78 L. ed. 1282, 1290.

[65]78 L. ed. 1282, 1290-1291.

pretation when he looked to the purpose of the framers of the Constitution in order to determine the meaning of the controverted clause in Article III. The basis of the decision is sound and the reasoning is clear and convincing. The unfortunate outcome which might have resulted from any other holding is easy to imagine.

The writer has no criticism of *Monaco v. Mississippi* as far as the point at issue is concerned, and is willing to admit that by the constitutional plan of 1789 a foreign state cannot sue a state of the Union without its consent. Is it so clear, however, that by this same plan a state of the Union can sue another state without securing its consent, especially on debt contracts? The writer believes not. Perhaps this *ought* to be the "constitutional plan," and perhaps it has become such by virtue of a line of judicial decisions, but certainly there was no clear pronouncement by any of the "fathers" to the effect that one state of the Union could sue another without its consent, or that entry into the Union constituted that consent.

However, since the Chief Justice presents as the basis of his decision a plan which is in harmony with the interpretations which Article III, Section 2 has received from 1789 to the present time, it is all the more acceptable to us, and the decision commends itself for its sound reasoning and its correct statement of the law.

It is clear, of course, that the question before the Court was one of jurisdiction and did not concern the merits of the controversy. There remains the question of the obligation of the State of Mississippi toward its bondholders. Many unprejudiced thinkers do not deny that there is at least a moral obligation, a point of view which has likewise been shared by a number of Mississippians.

APPENDIX

Time-table of Pertinent Facts Relating to the Bonds and Efforts at Collection

1833—Issue of Planters' Bank Bonds involved in suit.
1833—Act adopted permitting individuals to sue the State of Mississippi.
1838—Issue of Union Bank Bonds involved in suit.
1841—State defaults on interest on both Planters' and Union Bank Bonds.
1853—Judgment entered by Supreme Court of Mississippi in favor of Hezron Johnson on Union Bank Bonds, upholding their validity.
1856—Repeal of law permitting State to be sued.
1871—New statute adopted authorizing individuals to sue the state.
1875-6—Constitutional amendment adopted prohibiting payment of principal or interest of Planters' and Union Bank Bonds.

1880—Act adopted withdrawing right of individuals to sue the State of Mississippi.

1882—John T. Howard, representing the Council of Foreign Bondholders in London, proceeds to Jackson, Mississippi, with a memorial asking for settlement.

1890—Incorporation of the repudiation amendment of 1875 into the new State Constitution, as Section 258, Article XIV.

1930—March. A petition is addressed by Scottish holders of Mississippi Union Bank Bonds to every member of the United States Congress protesting against the repudiation of the bonds.

1931—May. Committee of the Amsterdam Stock Exchanges issues a circular to its members concerning the claims of Dutch holders of Mississippi bonds.

1932—9th February, 8th July, and 19th December. The Council of Foreign Bondholders addresses letters and a cablegram to Governor M. S. Conner formally recording the continued existence of the claims of the bondholders.

1933—26th September. Three bondholders, two of London and one of New York City, presented $100,000 of Mississippi bank bonds of the issues of 1831-33 and 1838 to the Principality of Monaco.

1933—18th December. The Principality of Monaco filed its motion and declaration against the State of Mississippi in regard to the bonds.

1934—21st May. The Supreme Court, speaking through Chief Justice Hughes, decided that the Court did not have jurisdiction in a suit by the Principality of Monaco against the State of Mississippi.

A RE-EXAMINATION OF OUR LEGAL RIGHTS*

WEX S. MALONE**

It is characteristic of a healthy growing civilization periodically to drag its time honored institutions out of the closet, pick them to pieces, and either give them the stamp of approval or overhaul them before setting them back to work. Today we find that the New Deal has put into effect a series of legislative enactments which, because they are in apparent disagreement with the rights of man as established in the Common Law, have shocked our legal consciousness from its state of lethargy. Suddenly and from many quarters we hear a loud cry in defense of the constitutional rights of individuals. Bitter and dramatic conflicts arise among the personnel of the bench, and not a few judges give open expression to their fears for the future of the legal order. The upshot is that legal philosophy has once again become a live issue, and the controversy of rights is raging.

Vehement champions of both sides of the argument are not lacking. Those favoring the new judicial and legislative policies insist that they are fighting for a liberalization of the law, are freeing it from its archaic fetters, and bringing it into closer accord with the prevalent social and moral ideas of the day. On the other hand, those of a more conservative legal temperament seeking to preserve what they believe to be the inherent constitutional rights of individuals tell us that we have impaired the security of commerce by experimenting with the law, have abandoned the cause of the individual, and imposed against civilization a menace which shakes the edifice of the Common Law to its very foundations.

The immediate struggle appears to center around the Contract Clause of the Federal Constitution, but it is not any single temporary impairment of the obligation of contract which is the real couse of our concern. Rather we fear the implications involved and their permanent and lasting effect on our legal system. The real issue in its broadest sense is a struggle between two antagonistic concepts of the end and purpose of the Common Law. The conservative group sees the law as a scheme of rights clustered around the individual and secured by a legal machine whose mission is to exercise a minimum of interference with human af-

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*This is the first of two articles on this subject.

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fairs. It regards the restraining force of the legal system as a necessary evil which must be tolerated only because it is apparent that where rights are unrestrained conflict is inevitable. It is claimed that this is the only system of law possible which is secure, democratic, and lasting. On the other hand, the liberal group would give us a more vigilant and active legal machine. It would dedicate to the State the power to circumvent individual rights whenever the exercise of those rights would produce unsocial consequences. No man should be permitted to make such use of his property or even his God-given faculties as will work an injury to the social order in which he moves. The rights of the individual have their sole justification in the fact that social welfare is furthered when the activity of the individual is not too closely hemmed in by limitations. Thus the rights of the individual, instead of being the final end and purpose of the law, become only one of the many interests the law seeks to secure to social life.

If we admit that the issue is a fundamental one involving policies which will seriously affect the law of tomorrow as well as of today we cannot escape the conclusion that it is our duty to give the question our honest and serious consideration. While the issues are still fomenting perhaps it will be difficult to make a wholly unimpassioned inquiry into the validity of either contention. Nevertheless we may gain some new insight into the problem if we will make a sincere effort to discard our preconceived views concerning rights and the nature of law and look afresh at the fundamental concepts which underlie the legal system. Perhaps we have been so absorbed in manipulating the law as it is already given us that we have failed to ask ourselves just what kind of a machine it is we are operating or to inquire whether it is the best possible one we could have, yet these are just the questions which are now in hot dispute. It is proposed to start at the very beginning and seek to determine the fundamental nature of law itself and the rights it seeks to secure.

If we were asked to single out some one salient feature which would distinguish *legal* justice, that is, justice as administered in the courts, from *fireside* or laymen's justice, I suppose we could correctly say that legal justice operates by referring to precedent or pre-established authority, while fireside justice rests wholly within the unrestrained will of the party administering the same. In other words, the function of the court of law is to administer what has already been established as right, while the function of the lay judge is to create the right from his own conscience and then to declare the same. However, we are forced at the outset to admit that any such arbitrary distinction is true only so far and for so much. What we have termed adjudication by reference to prece-

dent or authority is not only a characteristic of legal justice but is rooted in the practical experience of human nature. It is an important factor manifested in every determination which we make in our private daily affairs. The routine of life for each of us can be pictured as a series of decisions made and tucked away in the storehouse of our general experience. When we are confronted with the necessity of making a new determination we refer to previous conclusions reached in identical or analogous situations in the past, and make our new determination with reference thereto. Although it is not often that we go through the laborious process of consciously reconnoitering our experiences and asking ourselves: "What did I do at such and such a time?", nevertheless, with each determination made we feel the flow and sway of what we already know, and are guided by the general sense of profit and loss on the balance sheet of our accumulated knowledge. Thus no determination is wholly new. We carry with us as a part of our equipment a stock of authority and precedent which is an independent and controlling force in all our decisions.

In one sense, then, it is the glory of the common law that its authoritative content partakes deeply of the character of human experience. Can we go so far as to say that legal justice is no more than a complex manifestation of what is already found in the decisions we make in ordinary everyday life? I hardly think so, and I believe that the distinction we have made between legal and fireside justice holds good as more than a mere distinction of degree. Regardless of how authoritative and compelling on him may be a person's stock of experiences and precedents, those experiences are nevertheless peculiar to him as a single individual, and are the unique outgrowth of his personal history. It is true that he has available a broader body of guiding knowledge consisting of the general experience of mankind, but the weight to be given this general experience varies with each person. He is free to follow it without question, to modify it in application, or to disregard it entirely. The value to him of any portion of general human experience depends on his personal view of its applicability to the particular problem at hand.

How different is the situation of the jurist confronted with the necessity of administering justice according to law. He bears with him his stock of subjective or personal precedents just as the private individual does, but unlike the rest of us he cannot allow this subjective precedent to control or influence his official determination. He is compelled in his action by a second and wholly independent body of experience postulated entirely outside of himself in the imaginary or ideational entity known as the Common Law. By hypothesis this latter body of experience is contained in the reported legal decisions and in the accepted

technique of applying them. He is permitted to depart neither from the material given him nor from the established method by which that material is applied. The tradition of the legal order demands that all decisions of the Common Law system shall be rendered solely in accordance with the precedents or authoritative materials of the system itself. As a result we find that although the judge is equipped with the personal precedents drawn from his private life as well as with the precedents or experience of his legal system, he is nevertheless restrained from employing the former (except within certain narrow and well defined limits, as will be seen later), and is compelled to make exclusive resort to the wholly objective body of authority which is ready-made for his use. This compulsion of tradition, this self-imposed restraint on the part of the jurist is what we term the *sanction* of the legal order. Without this sanction the cohesive force of any system of law would be lacking, and the reported cases which we look on as the tangible evidence of the law's existence would be no more than a mass of unrelated valueless material. It is the subservience of the jurist to the sanction of the law which is the invisible but all-important warp of the legal fabric preserving the unified system of the Common Law in a composite whole.

It can readily be seen that the body of subjective or personal experience of the jurist and the body of the objective or traditional experience of the Common Law are not always agreeable between themselves and often may be entirely incompatible in content. The subjective experience is always potentially operating in a legal decision, and its influence is forestalled only by the relative momentary restraining force exerted by the legal sanction in its effort to maintain the integrity of the legal system. Because judicial thinking is thus bi-functional and subject to the operation of antagonistic motivating forces, we find departures from the accepted legal pattern, upheavals in the organic materials of the law, judicial lawmaking, and other phenomena giving rise to professional controversy and sometimes genuine alarm.

The rights, duties, and other incidents of the law as postulated in the objective precedents of the legal system tend to become regarded as permanent and inflexible, while rights and duties as gathered from the judge's body of personal experience are in a state of perpetual disorganization and flux. The rights incident to the objective legal system assume an idealistic aspect. We think of them as being inherent in mankind and believe that they transcend the realm of human error. On the other hand, the subjective rights of the jurist are the product solely of his own judgment and are subject to all the errors of human fallibility. There is no assurance that they will not vary with each judge nor that a single judge will apply them with any uniformity.

From the above it is apparent that any resort to materials outside those already established in the law must be sharply limited and defined in scope if our legal system is to be secure and uniform. On the other hand, an attitude of uncompromising refusal to recognize the validity of non-legal material ignores the element of *growth* which has always been a concomitant of the Common Law. The capacity of the law to absorb new material and thereby imperceptibly transform its entire system of tenets has been the means whereby it has succeeded in grafting itself to the stock of a changing civilization. Despite its self-avowed rigidity the Common Law is characterized by an astounding flexibility which is attributable solely to the fact that there has been a constant infiltration of ideas from the individual experience of the jurist himself. These ideas are in general those of his own time and place and fairly represent the civilization in which he lives. Once established as a part of the legal order they tend to become regarded as eternal and immutable and acquire all the characteristics incident to law generally. Thus they stand as a respected part of the legal scheme until in their turn they are overthrown by newer ideas from some extra-legal source.

Thus the body of precedents found in the authoritative materials of the law and those which constitute the stock of the jurist's private experience are equally important to any system of law which functions successfully. We cannot recognize one to the exclusion of the other but must rather deem it our mission to assign each to its proper sphere. To this end let us first examine the law as a pre-established body of precedent. We shall seek to discover if the law itself gives us in its authoritative materials the content of its own ends and purposes.

Toward the close of the last century it was the boast of legal philosophers that there had been evolved a system of law something in the nature of a metaphysical or logical pattern. The Common Law was seen as a body of scientifically inter-related rules or precepts, and it was believed that all the reported decisions bore an inevitable and logical connection so precise and perfect that any case could be regarded as a touchstone which would lead in a pre-delineated path of reason to any other case in the entire system. In order to render a legal decision the sole need of the judge was to traverse the electric paths of ordained reason and he would be safely led to a just conclusion in strict conformity with the requirements of the Common Law. His sole remaining duty was to apply the result of his enlightenment to the case at hand. In such a scheme there could be no conflict between what was established and what was moral, because the established right so precisely stitched into the legal patttern was all that counted in the law. Thus decisions which adhered to the logical symmetry of the system at the expense of

some moral interest were regarded as *strong* cases because they were faithful unto death. Here is your perfect self-sufficient scheme of law equally as mechanical and logical as the science of geometry and as irrefutable and permanent as mathematics itself.

We find the idea as to legal rights prevalent during the Nineteenth Century thus tersely expressed by a leading legal philosopher of the period:

> "A law, in the literal and proper sense of the word may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[1]

In the preceding century Blackstone had substantially defined law as a rule for human conduct commanding what is right and prohibiting what is wrong. Whatever might be our objections to this latter definition, it commends itself to us by recognizing that the rightness or wrongness of a legal rule is a factor which is at last worthy of consideration. By the Nineteenth Century this ethical emphasis had entirely disappeared, and the right was no more than the commanded thing. The specious reason, 'Because I told you to', is hardly a sufficient answer to a serious question regarding the nature of legal rights. The real situation was that in the Nineteenth Century moral rights had ceased to be legally important except as they were coincident with what was already fixed in the Common Law. We can implicitly accept as right whatever is given us in the legal order only when we have a mature system of law whose established ideals embody all those of the society in which it operates.

Despite the insistence of the jurisprudence of the last century on accepting the ordained scheme of things as binding, there has persisted in the minds of lawyers and judges an idea of a Natural Law based on the social nature of man and discoverable by him through his inherent power of reasoning. This theory dates back to the work of Hugo Grotius, a venerable philosopher who was writing early in the Seventeenth Century. Prior to his time the civilized European world had been content to accept the Justinian Code of Rome as authoritative and binding simply because it was the given and established law. It was not the mission of Grotius to lead a revolt against established authority. His was a different problem. New conditions were operating to undermine the authority and binding force of Roman law. The decline in prestige of the Catholic church which represented the unity of the spiritual Roman Empire had left the Justinian Code hanging in the air. There was a demand for a national rather than a universal law created by the birth of new independent states. Furthermore, the stimulus to commerce caused by discoveries in the New World and better relations between the

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[1]John Austin, Lectures On Jurisprudence, Lecture 1.

states of Europe had given rise to a body of international law whose authority had to be established. Grotius set himself to the task of placing the authority of *reason* behind the existing schemes of law. His choice of reason as authority was in keeping with the general thought current in his time, for he was writing in that period in the history of philosophy known as the period of Scholasticism with its new found and implicit faith in the powers of the human mind.

Natural Law involves two fundamental elements; first, a body of rights incident to the social nature of man, and second, the power of human reason to discover and make manifest these rights. In such a theory there are the germs of a true moral law, for one of its implications is an ideal of the right and the just to which the law must conform in order to be valid. Thus we might expect the followers of Natural Law to insist on the exercise of conscious effort to the end that legal and moral rights may be coincident. However, they have been content to accept the legal scheme as given to them and place specious reasoning behind what is already established in the law. The upshot is that Natural Law has been the toy of each and every one of the many conflicting schools of philosophy and has served only to becloud any intelligent understanding of the end and purpose of the legal order.

It is difficult for us modern lawyers to admit that there is something mystical or transcendental in our legal system, but we cannot successfully deny the fact that such is the essential nature of Natural Law as we accept it today. The underlying idea is that there exists a body of natural law which in all its manifestations is discoverable through the use of reason. This body of law is ideational. By ideational we mean that it is eternal and immutable, existing in a fixed state for all time in the realm of ideas. Into this metaphysical realm it is believed that the jurist through the aid of his reason is enabled to reach and seize the particular rule or precept for his immediate need. The process might be described as one of discovering what has always existed but which was heretofore unknown to mankind. Inaccuracy of reason might result in an erroneous selection of a particular rule, but it cannot affect the ethereal existence of the perfect natural law. Seen in this light such a scheme of rights and rules seems out of keeping with the hardboiled practical ideas of our generation; but when Natural Law is couched in such phrases as *"the inalienable and unalterable rights of man,"* we seem willing to embrace it without question.

Apart from any natural repulsion we may feel for so abstract and mystical a concept, there are several practical objections to Natural Law as a working theory. First, the true nature of natural rights can never be fully and accurately known because our reasoning power, which con-

stitutes the only means of access to the ideational realm, is fallible and subject to error. Indeed, the phenomenon of error plays an interesting part in the theory of Natural Law. It accounts for the presence of reversals and overruled or modified decisions in an otherwise perfect and infallible scheme. Courts and lawyers are deemed to *misconstrue* the law, for it is not in accord with Natural Law theories to admit that law itself may be inaccurate or imperfectly formulated. Thus it is the accepted belief that in overruling its previous decision the court has corrected the flaw in its formerly imperfect reasoning and discovered at last the true natural state of the law. But what assurance have we that the court has not erred in its new discovery? If the truth were known, perhaps the first attempt to bring the law to earth was the correct one. Indeed, how are we to know that our entire scheme of rights as previously discovered is not wholly the product of faulty reasoning? Perhaps today somewhere in the pink clouds of the metaphysical realm there exists a body of unexplored true and natural rights quite different from the scheme heretofore established by our courts. Thus Natural Law works to its own undoing, and we must admit that its unavailability to human consciousness renders it wholly unworkable in any concrete legal system even though we grant its eternal validity. In other works, it is so eternal and unknowable that it has become anything and everything we wish it to be.

The theory of Natural Law is subject to a second objection which has serious practical consequences. According to the philosophers who have given Natural Law to us the most essential quality of such a theory is the eternal validity of its rights. In this respect it bears the full stamp of all the weaknesses of tenuous academic thinking. Natural rights are fixed and static and are therefore unadjustable to the changing needs of civilization. They are impervious to any shift of balance in the moral or social equation, and are thus incompatible with any view of a dynamic progressive society. Nevertheless the fact remains that there have been new contributions to Natural Law from every period of history and each contribution represents a new idea which may be inconsistent with what was formerly given. All these ideas co-exist in the scheme of Natural Law, and although they may be mutually incompatible, they all alike bear the stamp of being eternally valid and uncompromising. Natural Law may admit with equal facility the divine right of kings and the inherent equality of men. As a matter of fact each epoch of civilization has reached into the grab bag of Natural Law and drawn from it just exactly what it wanted. Perhaps it would be more accurate to say that each epoch has dipped its particular ideals into Natural Laws great fount of knowledge and drawn them out wet with the liquor of eternal valid-

ity. In the last analysis there is little difference between the theory of Natural Law as we know it today and the *command* idea prevalent during the Nineteenth Century. The operation of both is back-handed from the present to the past. They are alike content to accept and preserve as valid and sufficient whatever happens to exist as authoritative in the legal system.

At this point we must take care to avoid any conclusion that because the traditionally accepted theories of law have failed to give us what we are looking for they are not serving a most useful function in the Common Law. Although they have ignored the moral element in the legal order they have nevertheless preserved the cohesive quality of the law through a stubborn insistence on uniformity and certainty of action. There is much that is vital to a well ordered civilization in a self-sufficient legal system which is firm, uniform, and dogmatic in its tenets, and which has determined its ends to its own satisfaction. Justice according to law must not only operate to settle disputes, but must establish a pattern for future behavior. Judge Cardozo has defined law as a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged.[2] We have in the law a yardstick enabling us to measure the bounds within which we may effectively function in the social order. Seen in this light, a mature, pre-delineated, and certain scheme of laws is a stabilizing force in civilization and is functioning in a most positive way for the benefit of mankind even when the doors of the courthouse are closed. Because the law must be uniform as well as just, it follows that in the nature of things there must be a certain amount of slack between the firmly established tenets of the law and the fluxuating moral ideals of society.

We may thus roughly summarize our conclusions up to the present:

Stability and uniformity of operation in the law, and the capacity of the law to absorb new ideas are both necessary to a successfully functioning legal system; yet they represent antagonistic and conflicting forces, and the recognition of one operates as an inhibition against the effectiveness of the other. Our problem is not how we may exclusively recognize one or the other, but to assign each to its proper and most effective place. The traditional theories of law have unduly insisted on a static legal system centered wholly around the interests of the individual. They operate only retrospectively in that they confuse what the law has *already accepted* as it ends with what it *should accept,* and thus they have become merely descriptive. The idea of the last century that

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[2]THE GROWTH OF THE LAW, 52 (1924).

whatever is commanded is *right* is applicable only to a mature legal system whose ideals are in full conformity with those of the society in which it operates. In such a scheme of law the moral right has ceased to be legally important. Although Natural Law is a potential force for good through its insistence that the law is valid only in so far as it is morally right and just, yet it has degenerated to the point where it is satisfied to place specious reasons behind whatever passes as authoritative in the legal system. It is therefore incapable of stimulating the direction of conscious effort toward the betterment of the law.

COMMENTS ON MUNICIPAL GOVERNMENT IN MISSISSIPPI

KENNETH P. VINSEL*

The municipality is the child of the state and its basis is in the state constitution and the legislature. In Mississippi there is little constitutional basis and the doctrine of legislative supremacy is well established.

The right of local self-government contended for by Judge Cooley of Michigan in 1871 and endorsed by McQuillin has had no following in Mississippi. Municipalities in Mississippi have been permitted to govern themselves with a comparatively free hand by the legislature, but there is no constitutional guarantee of such freedom nor can it be defended on the grounds of the right to local self-government.

In actual practice, the legislature has not seen fit to exert its supremacy and has consisently refused to force measures upon its municipalities. Most provisions regarding municipalities are subject to local option. There is no home rule provision for the framing of charters and only in the case of cities is there an option of a form of government. Except for the form of government, state supremacy has not been extended to strictly local affairs.

The general code charter makes adequate and reasonable provision for the incorporation, consolidation, absorption, dissolution and abolition of municipal corporations. The plan in general follows those of other states.

The burden upon the legislature in granting special charters became so great that the practice was prohibited in the Constitution of 1890. Since that time municipalities may be incorporated only under the general provision. The cities still operating under special charters have the right to amend their own charters without the action of the legislature. By acting through their own governing authorities the special charter cities may amend their charters, providing the approval of the municipal electorate and the attorney-general is obtained. The court upheld this power when it was attacked as an unconstitutional delegation of legislative power.

The classification of Mississippi municipalities under the general law would not be satisfactory in most states, but it has served the condi-

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tions in Mississippi reasonably well due to the absence of large cities. It does not seem wise to allow the incorporation of communities having fewer than one hundred inhabitants. To class all municipalities containing more than two thousand inhabitants in one division seems inadvisable. Only recently, however, has Mississippi had a city containing as many as fifty thousand persons and the absence of large cities has allowed the present classification to exist without great difficulty. Cities are allowed the option of adopting the commission form of government and many of the larger ones have availed themselves of this opportunity.

The provision enabling cities to extend their boundaries to include recently incorporated municipalities appears to be wise policy. Numerous municipalities, under this provision, may be prevented from existing side by side with the duplication of officers and services. Absorption by the older and larger municipality seems a wise provision.

The mayor-council form of government provided under the Code Chapter is of the weak-mayor, strong-council type. In practice this is not always the case, as a strong mayor may exert influence to a much greater extent than his legal power indicates. A rather unique feature of this form of government is the fact that the mayor and board of aldermen are granted powers as an entity. With this exception the system is very similar to the weak-mayor, strong-council form of government in smaller cities of other states.

The commission form of government has operated satisfactorily in many cities of Mississippi. In others it has not been wholly satisfactory. In those cities in which the mayor has tended to be the dominant figure, there has been little compliant. In these cities, the common objection to the commission form, i.e., the lack of unity and an executive leadership, has been absent.

The commission form of government was established by most of the cities now using it during the wave of its popularity as a panacea for the evils under the mayor-council form. The same defect is present in both forms—the lack of centralized responsibility. The council of three is not adequately respresentative nor does the plan secure efficient administrative officers. The commission form has not proven to be the panacea that many expected.

Unfortunately, there is no provision in the state for the city manager form nor for the strong-mayor, weak-council form. In actual operation, many cities with dominant mayors have the practical advantages of these forms. There has been little agitation in Mississippi for the strong-mayor, weak-council or the commission-manager forms of government. The common argument used against these forms is that too much power is given to one man.

The commission form as provided in Missisippi is comparable to the commission form in other states. It provides, however, for three commissioners rather than five or more.

The greatest defects in the two forms of government provided for Mississippi cities are the lack of unity and executive leadership, and the lack of centralized responsibility.

Simplicity in the structure of municipal government combined with the short ballot is a generally recognized canon of municipal government. In this respect Mississippi is well provided. Responsibility is not widely diffused and the electors are called on to choose a small number of officials. Bad government due to the election of corrupt or inefficient men to office cannot be entirely avoided, but a system is desirable which facilitates an intelligent choice.

In municipalities the right of suffrage is limited by numerous restrictions. These restrictions tend to eliminate disinterested persons. The elector must be a qualified elector for state elections, and there are, therefore, required his proper registration and the payment of all required taxes, including a poll tax of two dollars. All males between the ages of eighteen and fifty-five are also required to pay a street tax of five dollars to the municipality. The result is that persons not interested in elections often find themselves unable to vote. Municipal elections tend to indicate the opinion of the more interested portion of the inhabitants.

The interpretation of the Supreme Court of Mississippi that the blank space under the title of each office enables a voter to write in the name of a candidate only in case of the death of a nominee for that office is unique. Although the voter should not be generally restricted in voting for candidates, the lack of the importance of the "official election" might easily permit a minority group to elect a candidate if the law were otherwise interpreted.

The iniative, referendum and recall are provided under both the code charter and commission form of government. The initiative and recall are seldom used but the referendum is frequently resorted to. The referendum is most frequently used under mandatory provisions of the charter but it is also frequently used by the aldermen or council to obtain the opinion of the electorate on important questions where the council are not unanimously agreed. The provisions for these measures are advantageous and adequate and there seems to be no tendency toward their too frequent use.

The ballot is generally a short one. The mayor, the council, the police justice (in certain cities), and the marshal (in code charter municipalities) are the usual officers elected. In code charter cities, the elector is called upon to vote for a mayor, marshal, ward alderman and an alder-

man-at-large. In commission cities the elector votes for a mayor and two commissioners and a police justice. The ballot is short and the electorate is not confused by a large number of candidates.

The powers given to Mississippi municipal corporations to be exercised through the governing authorities are broad. The grants of the legislature have been broad and the legislature has usually been willing to grant new powers when municipalities want them.

Mississippi municipalities are given wide powers in regard to the ownership, construction, acquisition and operation of public utilities. This power extends to water works, light and power plants, hydro-electric plants, street railways and interurban railways. Power is granted municipalities to cooporate and combine in such projects. Bonds may be issued for the acquisition of public utilities and revenue of the utilties may be pledged for the payment of such obligations.

Provision is made for all municipalities of less than twenty thousand inhabitants to sell or dispose of their public utility plants. The proposal of sale or disposal must be published and an election must be held upon protest. Public utilities can only be disposed of with the acquiescence or approval of the electorate. Municipal ownership is not handicapped by legal restrictions.

Although few cities have taken advantage of the permission to pass zoning ordinances, the law permits cities over five thousand inhabitants to do so. A standard state zoning act was passed in 1926.

Mississippi municipalities are not handicapped by taxing limitations or by debt restrictions. These limitations and restrictions are elastic in view of the fact that the restrictions are based upon assessed valuation. The limitations have not acted as a restraint on municipalities in their desire to enter into new activities.

The principal municipal revenue is obtained from the general property tax. The assessment, lexy and collection is made by the municipality. The street tax levied upon males has outgrown its usefulness. Based originally on the idea of contributing to the upkeep of the municipal streets the present tax amounts to a poll tax upon males. The business and occupational taxes levied by municipalities are not satisfactory except as regulatory taxes.

There is no budget system required of municipalities and few of them have intelligent systems of financial planning and spending. The state does not supervise the municipalities in their financial affairs. Each city is left to its own system or lack of system.

Financial control of the schools of the city is in the hands of the council. The board of education, appointed by the governing body, plans

and administers the school budget under the guidance of the superintendent of schools but final approval of the budget remains with the governing body of the municipality. The school levy is included in the general municipal levy. This plan allows an independence of school administration and at the same time the financial needs of the schools may be weighed in comparison with other needs.

Because of the former practice of refunding bonds and allowing municipalities to avoid payment of the principal, many cities became heavily indebted. The present requiremnt as to the maturity of municipal bonds closely approaches the serial bond system. Although it is not strictly a serial bond system, it is very similar and sufficient to prevent municipalities from avoiding an annual payment on the principal of their debts.

Broad power is usually accompanied by strict responsibility. While Mississippi municipal corporations are permitted by the legislature to exercise compartively broad powers, they have been held to a comparatively strict liability by the courts. The tendency is consistent since both branches of the state government have held that most powers and duties of the municipality were private, providing for local necessities and for the conveniences of the local citizens.

Mississippi municipalities are held liable for the maintenance of parks, sewers, and for disposal of garbage. Although the provision of these services may be governmental, the liability is held to be of a corporate nature. The state has held its municipalities more strictly liable than have most states.

The general tendency in Mississippi has been to give too little attention to administrative methods. The greatest inefficiency occurs in administration. Coercion by state agencies has not been used as a means of correcting administrative defects. Municipalities will probably oppose supervision by state agencies as long as they consider municipal government more efficient than the state government.

Probably the most intelligent and satisfactory method of securing efficient administration is in supplying the municipalities and their electorate with information, facts and impartial advice. Mississippi lacks bureaus of information which would be valuable to the ever changing officials. The Research Commission of the State of Mississippi, initiated by the legislature of 1930, is a beginning. Such a bureau, given proper support and direction, might become a worthwhile agency.

A study of the legal aspects of municipal corporations in Mississippi results in the general conclusion that the state's municipalities are well provided for. The legal provisions are such as to allow the municipality to adequately serve its inhabitants.

Mississippi municipalities are comparatively well governed. The electorate take an interest in municipal elections and capable men are generally elected to office. Municipal government has probably been as efficient in performing its functions as the state government has been in performing its functions.

The presence of a large negro population presents some problems in the government of municipalities. The importance of these problems is not as great as the proportion of negroes might indicate. Although in 1920 the negro race made up 58.5 per cent of the total population of the state, the urban population was 58.9 per cent white and 41.1 negro. While the negro race outnumbers the white race in the rural districts, the opposite is true in urban districts.

Although as a race the negroes are poorer than the whites, they pay their share of the taxes and derive a somewhat proportionate share of the expenditure. The presence of poor sections causes problems in any municipality, which is as true in Mississippi as elsewhere, but this is not particularly a race problem. Taxation may be slightly higher because of the poor sections in the municipality which do not support themselves by the amount of taxes they pay. The contention that taxes are higher in proportion to the number of negroes in a city is not evident in Mississippi.

The comparative efficiency of Mississippi municipalities under the present forms of government may be due largely to the absence of large, congested cities and to the interest of the local electorate in their town and city government.

A lack of any feeling of hostility between rural and urban elements has prevented the legislature, which will usually be rural under the present constitution, from meddling in the local affairs of municipalities. The municipalities with adequate powers, a large degree of local option and simple forms of government have been able to perform their function with an efficiency which can be favorably compared to other states.

* * *

The foundation of democracy is usually said to be in local self-government. If this is true the need must be largely fulfilled by urban units of government. The future will determine whether the city is the hope or despair of our democracy. That it might be the hope rather than the despair has prompted many to urge a more certain assurance of local self-government than that to be found in legislative supremacy. This guarantee would necessarily be in consitutional provisions. The Committee on Municipal Program of the National Municipal League proposed such measures in 1915.

As the variations in the size and the differences in the conditions of cities increase, this plan of guaranteeing a certain amount of home rule by constitutional provision seems expedient not only as a preservation of local self-government but as a method of securing for each city the most suitable form of government.

Home rule means that state supremacy will be exercised only with regard to matters of state wide concern and that in local affairs authority will rest with each community. Home rule is briefly the power of a city to regulate *its own affairs*. Only by constitutional provisions can home rule be guaranteed. The power of a city to regulate its own affairs in Mississippi rests entirely within the discretion of the state legislature. Should a feeling of hostility arise between urban and rural interests the legislature might easily lend itself to unwarranted meddling with municipal government and administration. It seems advisable that the state constitution contain provisions safeguarding local self-government to the municipalities.

Constitutional provisions might well allow cities to frame and adopt their own charters. Further guarantees of local self-government by the constitution might include provisions securing certain powers to municipalities. These constitutional powers secured to the municipalities should include the powers to levy, assess and collect taxes; powers over public services and public utilities; powers over municipal property and improvements, including excess condemnation; power to issue and sell bonds; power to organize and administer schools; and power to adopt and enforce police, sanitary and other similar regulations. The constitution should contain some limitations within which these powers are exercised such as a maximum debt limit or a maximum tax levy. These constitutional provisions would guarantee municipalities their essential powers free from legislative interference.

With the exception of framing and adopting their own charters and the power of excess condemnation Mississippi municipalities exercise the above named powers, but there is no guarantee of their continuance. There should be no objection to entrusting cities with these essential powers of local government. If local self-government cannot be trusted there is little hope for democracy.

When the welfare of the whole state or a large part of the state is involved in some particular function the locality must give way. A certain amount of state control should be maintained. Administrative control must not be confused with home rule. Home rule limits the sphere of state supremacy while administrative control is a method of exercising state supremacy. In regard to municipal debt limits, tax limits, annexation of territory, regulation of privately owned public utilities, and such matters

the state interest is dominant and the state should control. In many functions the state and city should exercise concurrent jurisdiction but on many others the municipality should have exclusive jurisdiction.

The legislature would do well to establish some state financial supervision, not as a measure of control and dictation but as a means of informing the municipalities of their condition. A provision requiring a municipal budget system is desirable. When properly informed, the municipal electorate is probably the best judge of its finances.

Increase in municipal activity is usually accompanied by an increase in expense. The cry of lower taxes is often raised, but there is little possibility of lowering taxes when the demand for more extensive and intensive service increases. The main problem is not so much to keep down expenses and taxes as to secure, without excessive waste, the service demanded by the municipality. The aim should be to secure the maximum amount of public service for a reasonable amount of public money.

The adoption of a budget system would be beneficial in procuring more intelligent expenditure. The budget must be wisely planned with effective direction and responsible administration. Final acceptance should be with the board of aldermen or council with ample opportunity for public hearing. If supervised by the state the supervision should be more in an advisory capacity, bringing defects to the attention of the electorate.

Intelligent and efficient financial planning should comprehend two things, (1) a complete plan for the coming fiscal year in the form of a carefuly prepared document, and (2) a definite plan of procedure for the execution of the financial plan. The budget should include all activities of the city, the work the city is doing or undertaking to do, the agency to do the work, the cost, and how the cost is to be met. Publication and a public hearing would enable the people to know the plans for the next fiscal year.

The wrongs in administration can be partially avoided by furthering correct methods of administration. Coercion and grants-in-aid as means of enforcing correct methods of administration are often unsatisfactory. People generally seem to be better satisfied with less efficient self-government than with a more efficient government which is forced upon them. Probably a more intelligent and satisfactory method of securing efficient administration is the method which supplies the municipality with facts, information and advice. A state audit of municipal finance should be valuable in this respect.

Further aids to administration might result from a uniform system of bookkeeping in all municipalities and the making of regular reports in a specified form to the state auditor. In the larger cities the adoption of

the merit system should be advantageous. Examinations rather than politics should determine the selection of clerical and technical employees.

A Municipal Research or Reference Bureau, impartially studying the state's municipal problems and making recommendations, would also be valuable. Efficient self-government must rest upon the intelligence and knowledge of the electorate.

Although efficient administration and capable officers are more important than the form of government, the latter is important in obtaining efficient administration and capable officers. The experience in other states indicate a preference for a stronger executive than the mayor of code charter municipalities. The Mississippi mayor, in code charter cities, should be given the power of appointment and removal of administrative officers. This provision would centralize the responsibility for administration. The ballot in code charter cities could be further shortened by providing for the appointment of the marshal by the mayor or council.

It is unfortunate that under the present law Mississippi municipalities do not have the option of the commission-manager form of government. Based on the present commission form provisions, the manager plan could easily be provided. A commission of five might be more representative than the present commission of three. These five should elect the manager who would have complete charge of administration, subject to the policy of the commission. Adding such provisions would be comparatively simple. In other matters the provisions governing code charter cities and commission cities could be made applicable to the commission manager form.

Mississippi would probably provide a more secure, satisfactory and efficient municipal government and administration by the adoption of the following measures: (1) constitutional provisions to allow cities to frame and adopt their own charters; (2) constitutional provisions securing the municipalities their essential powers free from legislative interference; (3) statutory provisions requiring a municipal budget system; (4) state audit of munipical finance; (5) a uniform system of bookkeeeping and reporting; (6) the merit system in the larger cities; (7) a Municipal Research or Reference Bureau; (8) statutory provision to allow the adoption of the strong-mayor, weak council form of government and the commission-manager form.

The state should be aware of its increasing municipal problem. Government should be simple enough to be understandable, the public should be kept interested and informed. Provision for intelligent local self-government should ever be maintained.

RESTRICTION OF THE JURISDICTION OF THE UNITED STATES DISTRICT COURTS AS TO CONTRACTS BETWEEN THE UNITED STATES AND CITIZENS*

INTRODUCTION

Government in Business

During recent years the volume of private business has decreased and the government has engaged extensively in private business. There is hardly a department of the United States government that does not in some manner carry on purely business operations which come in direct conflict with private business. In these operations it is frequently necessary for the Government to contract with individuals for supplies, services, etc., and in many instances the Government makes sales to individuals, varying all the way from envelopes to insurance. The Government is now in the home loan business, farming business, banking business, power business, printing business, insurance business, and many other types of business too numerous to mention.

The right of the Government to engage in private business need not be considered here. We are restricted to the consideration of the rights of those citizens dealing with the Government, in its commercial capacity as an insuror, seller, buyer, etc., to representation by counsel and fair trial in courts under the usual rules of law when disputes arise over these commercial activities.

IF GOVERNMENT IN BUSINESS, COURTS NOT BUREAUS SHOULD BE PLACE FOR SETTLING DISPUTES

There is a constantly growing tendency in those bureaus, departments and governmental bodies engaging in business enterprises to foster legislation permitting those bodies to settle disputes arising between the bureau, department, etc., and citizens by administrative decree rather than through recourse to the courts. At least one of these governmental bureaus has on numerous occasions caused to be enacted laws restricting the rights of citizens to services of counsel when dealing with that bureau through the statutory curtailment of counsel's fees. The same bureau or governmental

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body has urged successfully the restriction of the jurisdiction of the United States District Courts over these disputes.

If the Government must enter business, as it has during the last few years, (see article by Charle R. Fowler, American Bar Journal for September, 1932, page 567), it should be in the same position as any other person, firm or corporation dealing in a commodity or engaging in business in so far as the settlement of disputes arising over contracts is concerned. Jurisdiction over these disputes should be in the United States courts and preferably in the United States District Courts.

As a sovereign the United States Government cannot be sued unless it gives its specific consent to the suit. Many years ago, prior to the Government engaging in general business, the United States established a Court of Claims.[1] Later it was found that the Court of Claims was clearly inadequate to meet current needs, and Congress passed the Tucker Act (March 3, 1887).[2] One of the provisions of the Tucker Act provides that all suits brought under the provisions of that Act shall be tried to the court without a jury.[3]

Many matters do not fall within the purview of the Tucker Act or the jurisdiction of the Court of Claims, and among those is the settlement of disputes between the Government and its citizens over a contract of insurance.

SPECIFIC INSTANCE—GOVERNMENT INSURANCE

The United States Government during the World War entered the insurance business.[4] It insured the lives of soldiers for sums ranging from one thousand dollars up to ten thousand dollars against both death and permanent and total disability. Premiums were deducted from the soldier's pay to cover the cost of this insurance, other than the actual cost of administration.

Subsequent to the World War this insurance has been continued by many thousands of ex-soldiers and there is now in force a sufficient number of these policies to make the United States Government the world's largest insuror, there being in force in 1931 some 600,000 policies of insurance.

Congress conceding that there might be disputes between the insured and the United States Government over these contracts of insurance, provided at the time of the granting of the insurance that actions might be brought in the United States District Courts against the United States

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[1]Title 28, USCA, Sec. 250.
[2]359, Sec. 1224, Statutes 505; Title 28, USCA, Sec. 41.
[3]Little, Title 28, USCA, Sec. 41.
[4]Article IV—Public No. 90, 64th Congress, Approved, October 6, 1917 as amended. Part III, Title 38, USCA, as amended.

on these contracts of insurance.[1] Since the passage of the act permitting suit on these contracts of insurance there has been a number of attempts on the part of the insuror, through its Veterans' Administration (government insurance department) to restrict the jurisdiction of the United States District Courts over disputes arising from government insurance contracts.[2] To illustrate this it is necessary to point out the peculiarities of the government insurance policies.

PECULIARITIES OF GOVERNMENT INSURANCE POLICIES

The original insurance granted by the government was in the nature of term insurance. At that time the insured men were all engaged in the active service of the United States during the World War and instructions were issued to deduct from the insured's pay, while in the military service, sufficient money to cover the cost of the insurance. The terms of the insurance contracts were set out by law and by regulation. The insured did not receive a copy of the insurance contract for the contract was not set forth in any one document. The insured was merely informed that his life was insured against death and permanent and total disability, and later by regulation, permanent and total disability was defined.

Still later the insured was given the right to convert his policy into a Five Year Term, Life, or some other form of policy, which policy was in writing and contained practically all of the provisions of the insurance contract.[3]

Please bear in mind that though the Government engaged in the insurance business, and issued insurance polices for which it received premiums, it being a sovereign agency, it was necessary to confer jurisdiction on the United States District Courts to settle the disputes arising over these polices, and Congress so provided. Congress, however, restricted the insured in the employment of an attorney by providing that the

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[1]Sec. 405, Pub. No. 90, 64th Congress. Approved October 6, 1917, as amended; Title 38 USCA, Sections 445 and 717.

[2]Note—Section 405, Pub. No. 90, October 6, 1917, gave District Courts jurisdiction over these disputes and limited attorneys' fees to 10% of amount recovered through suit. Evidence need not be presented to Bureau. World War Veterans' Act, 1924, Sec. 19, provided that no claim agent or attorney should be recognized in the prosecution of a claim for insurance except after "disagreement" and limited fees to 5% of amount recovered after suit. This section amended March 4, 1925, so as to increase attorneys' fees through passage of Section 500 WWVA, which limited fees to 10% after suit, payable ten per cent per installment falling due under contract. Sec 2 and 17 Public No. 625, 68th Congress, approved March 4, 1925. Same enactment limited fees in presenting evidence to Bureau or claim for insurance to $10.00 and attorneys still not recognized. Section 19, World War Veterans' Act, amended July 3, 1930, Section 445, Title 38 USCA, requiring Bureau acknowledge "disagreement" before suit on appeal to Director thereof. March 20, 1933, all laws appertaining to term insurance repealed including right to suit. Act of March 20, 1933, c. Title 1, 17, 48 Stat. 11; Sec. 717, Title 38 USCA.

[3]Title 38, USCA, Sec. 512.

court might in its judgment allow an attorney for a successful litigant a fee not to exceed 10 per cent of the amount actually received as a result of the suit, and penalizing the payment of any other fee in excess of $10.00. Th 10 per cent was later reduced to 5 per cent, at the request, we understand, of the insuror. Then again, through the efforts of the American Legion, the fee was increased to 10 per cent over the protests of the insuror, the then Veteran's Bureau.

INSURED NOT INFORMED AS TO LIMITATION OF REPRESENTATION BY COUNSEL

The insured was not advised that his right to recourse to the courts, in the event of a dispute over the terms of the policy, was limited. Nor was he advised that his right to representation by counsel was limited. At the time of the issuance of the contract and at no subsequent time, we believe, has the insured been informed that the insuror may, through the influence of the Veterans' Administration (Veteran's Bureau) the insurance carrier, cause Congress to further restrict and change the terms of the policy so as to take from the insured his inherent right to try his case in a court of justice.

In fact, by a recent act of Congress, under guise of economy,[1] all laws were repealed appertaining to term insurance, except as to those cases where suit was theretofore on file in the United States District Courts.

Please bear in mind that none of these limitations and restrictions and differentiations appear on the face of the policies.

These insurance policies are payable at the rate of $57.50 per month (if they be $10,000.00 policies) if the insured is found to be permanently and totally disabled during the life of the policy.

An attorney for an insured in a war risk insurance suit is limited to 10% of the amount recovered. In the event that suit is brought on a current policy, and recovery is had, say for a period of a year prior to the date of the judgment, the attorney can recover but $75.00 for his services, although he may be allowed a small percentage of payments to be made in the future. *If the claim is allowed by the insuror, the attorney receives no fee other than* $10.00, *and if a suit is lost no fee may be allowed the attorney.*

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[1]Act of March 20, 1933, Chapter 3, Title 1, Sec. 17, 48 Stat. 11; Title 38, USCA, Sec. 717.

COMPARISON

There are many procedural differences in making claim, presenting proof, and filing and prosecuting suits on governmental insurance policies as compared to the procedure on commercial contracts. Some of the differences will appear in the following comparison:

COMMERCIAL INSURANCE	GOVERNMENT
Amount of Insurance	*Amount of Insurance*
$10,000	$10,000
1 Insured has a $10,000 insurance policy, payable in monthly installments, in the event of permanent and total disability.	1. Insured has a $10,000 insurance policy, payable in monthly installments, in the event of permanent and total disability.
Claim for Benefits	*Claim for Benefits*
2. Insured through his attorney, makes claim for benefits under policy and contracts with his attorney to pay his attorney a fair fee for his services rendered in the event of settlement.	2. Insured makes claims for benefits or endeavors to have an attorney make claim for benefits for him. The attorney discovers that he cannot charge a fee in excess of $10.00. He is not interested, for the amount of work involved is excessive. The insured makes his own claim.
Allowance or Denial	*Allowance or Denial*
3. (a) Insurance Company allows claim of insured after considering evidence submitted by insured's attorney, and insured pays his attorney a fair fee for services rendered. Percentage of claims allowed high. (b) Denies claim or ignores claim. (c) Compromises claim, both parties being represented by attorneys.	3. (a) The Government allows insured's claim. No fee allowed attorney. Percentage of claims allowed minute. (b) Denies claim after lapse of eighteen months to three years, in the meantime obtaining detailed statements from insured's witnesses and others out of the presence of the insured, insured not being represented by an attorney. Lapse of time—not sufficient evidence of "disagreement" to permit suit. Suit cannot be filed

	until Government denies claim, no matter how much time elapses.
Time elapsed since filing of Claim and date of allowance or denial	*Time elapsed since filing of Claim and date of the allowance or denial*
4. Not over a month.	4. From ten months to two years.
Suit Filed	*Suit Filed*
5. The number of suits filed in which the commercial insurance company is defendant is small in comparison to the number of claims made, a large portion of the claims being paid because of the presentation of insured's case through his attorney, thus convincing the insurance company that recovery is likely. The company in such cases settles and avoids the cost of defending expensive suits. Many of these cases are compromised to the mutual advantage of the insuror and the insured, and on a fair basis, both parties being represented by counsel.	5. (a) In comparison with the commercial insurance company very few claims are allowed. Though the Government has accumulated a vast volume of records in the form of examinations and other medical data from the official records maintained in the War Department, and has investigated and obtained statements from the insured's witnesses and otherwise perfected its case, it has not had the insured's case presented to it in a clear manner. Thus the officials of the Government are of the opinion that the claim can be defeated in court. In arriving at this opinion, these officials also take into consideration the fact that an attorney for the insured can receive but 10% of the amount actually sued upon, and thus cannot devote as much time to the case as the attorney in an average case against a commercial insurance company. (b) Suit may be compromised by the Attorney General in some instances where suit was pending on a term insurance contract prior to March 20,

	1933, see Act of June 16, 1933, Chapter 101, Sec. 1, 48 Stat. 302. This feature of the law has not been put in operation for some reason or other and very few compromises are made. In some districts compromise will not be considered until the case is set for trial, which may be several years after it is filed in the District Court.
RESULT	RESULT
Average Cost	*Average Cost*
6. (a) Average cost of defending cases in court by the commercial insurance company is negligible as compared with the cost of the Government. The number of cases filed in court against commercial companies is slight in comparison with the number of cases filed against the Government and in proportion to the number of claims filed against each.	6. (a) Expense to the Government in defending cases great, estimated at one time as several thousand dollars per case.
Average Time Consumed	*Average Time Consumed*
(b) Average time consumed between date of filing claim and date of trial at most not more than one year.	(b) Average time consumed between date of claim and date of trial three to four years.
CONCLUSION	CONCLUSION
7. Commercial insurance companies have concluded that an economical early compromise settlement is much better than the risks of suit. They invite attorneys to present the plaintiff's evidence to them and endeavor to work out equitable settlements. The cost of the settlement is therefore neg-	7. This procedure and arrangement on the part of the Government highly unsatisfactory in that: 1. Expensive. Majority of claims denied and suits filed after great lapse of time. Average cost of defending suits very high and estimated at $4,000 by General Hines at one

ligible, most of the same being borne by the insured in gathering his evidence and presenting it to the insurance company through his attorney.

time. Percentage of suits lost better than sixty.

2. Disadvantageous to insured for—

   (a) Lapse of time—insured likely to die before payment, as he is permanently and totally disabled.

   (b) Inadequate representation in presenting evidence to the Government so that settlement may be effected without long delay.

   (c) Loss to insured by reason of lost records, death of witnesses, death of insured and court costs.

   (d) Elimination of the contract (without recourse) by reason of the restriction and elimination of District Courts' jurisdiction over insurance contracts.

3. Disadvantageous to Public, courts and attorneys—the practice of forcing these cases into court and "cluttering up" the District Court calendars has a detrimental effect upon the courts,—public and the Bar as a whole.

   No doubt many of you have been inconvenienced and delayed in other matters because of this condition. Much of this would be prevented if the insured might be represented by counsel when demand for payment was made.

JURISDICTION OF COURTS FURTHER LIMITED

In July, 1930, the World War Veterans' Act[1] was amended so as to more specifically define the word "disagreement." This provision was sponsored by the insuror, the Veterans' Administration, and limited the jurisdiction of the United States District Courts to those cases where "disagreement had been acknowledged on appeal by the Veterans' Administration."

The Veterans' Administration, as the insuror, refuses to consider a claim or "acknowledged disagreement" unless the insured states in detail, on the form provided by the insuror, all of his medical and industrial history, and sets forth thereon the names and addresses of his employers, friends and physicians, including the hospitals where he has been treated.

By reason of the provisions of Section 500 of the World War Veterans' Act,[2] an attorney who accepts a fee other than $10.00 for services rendered in the preparation and presentation of a claim to the insuror, is guilty of a misdemeanor. Because of this, the insured must, without the aid of counsel, place in the hands of the insuror all of the facts on which his claim is predicated, and frequently he is entrapped by the very nature of the form itself. The insuror does not disclose to the insured any of the inforamtion in its possession accumulated over a period of years and derived from the "compensation" or "pension" side of its activities.

The insuror then proceeds to investigate the claim, have the insured examined, interview the insured person's witnesses, and otherwise prepare its case so that when "disagreement" is issued the suit following can be won by the insuror.

Please bear in mind that the insuror has conducted its investigations, interviewed the insured's witnesses and physicians and examined him, time and time again, before it acknowledges "disagreement." Cases pend before the insuror one year to three years and the insured has no recourse—he cannot procure an attorney, for he cannot pay him, and where he is so fortunate as to have an attorney represent him gratuitously he finds that his attorney is ignored by the Veterans' Administration and that the attorneys for the Veterans' Administration deal directly with him and his witnesses to the end that the insuror's case is bettered and his case is harmed.

Delay is also a powerful weapon, lack of representation by counsel is a weapon, and the records on which he relies are lost, his witnesses disappear, and he abandons his insurance claim—a badly disillusioned man.

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[1]Title 38, USCA, Sec. 445.
[2]Title 38, USCA, Sec. 551.

FURTHER RESTRICTIONS OF JURISDICTION OF DISTRICT COURTS ATTEMPTED BY INSUROR IN 1932

The Veterans' Administration, as insuror, through its Administrator, General Hines, attempted in the Spring of 1932 to further restrict the jurisdiction of the United States District Courts so as to further limit and restrict the insured, in a suit on a war risk insurance contract, to that evidence previously submitted to the insuror before suit was filed, *at which time the insured did not have and could not have counsel to represent him.* In other words, an attempt was made to railroad through Congress, under the guise of "economy," a further restriction on the jurisdiction of the United States District Courts.

In this connection let us call your attention to an address made by Congressman Phil Swing, a member of the Bar of the State of California, on the floor of the House of Representatives, as shown by the Congressional Record of April 25, 1932, with respect to the attempt by the Veterans' Administration to railroad through, under the guise of economy, a statute further limiting the right of the insured to settle his dispute in the courts of the land:

> "Another provision of the Economy Bill is to have the Government save money by being slow in deciding veterans' cases. The language limits the time for beginning payments on a claim to six months prior to the decision. What possible relevancy can the date of the decision have? The date of the beginning of the disability, the date of the filing of the claim, or even the date of filing of the proof, but never the date of the decision—that merely puts a premium on delay on the part of the Bureau. There are thousands of claims for permanent and total ratings now pending. Most of them have been pending a year or more. At present rate of action, the Bureau will be another year in deciding this group. On what principle of justice can you penalize the claimant for the slow action of the Government?

COURTS OF JUSTICE DENIED RIGHT TO LEARN FACTS IN INSURANCE CASES

> "Next comes the strangest proposal of all, and that is when a suit is filed upon an insurance policy, the courts, although called upon to decide the merits, are to be prohibited from ascertaining the facts. It is provided that the courts of justice can not hear any evidence except that which has been first presented to the Veterans' Bureau. Under the law a veteran cannot hire a lawyer to help him prepare his case for the Veterans' Bureau. He has to depend upon laymen and upon his own ingenuity. When he finally gets into court, and has the benefit of a lawyer, the lawyer will be of little use to him if this provision becomes a law. The plaintiff must submit to the Veterans' Bureau every bit of evidence that he intends to use in the case, and let the Veteran's

> Bureau have the benefit of that knowledge in fighting the case in Court. There is no corresponding provision that the Veterans' Bureau submit to the veteran the evidence which the Government proposes to offer in court.
>
> "What I object to is having one form of law and regulation and procedure for the trying of insurance contracts if the Government issued them, and having an entirely different set of laws and rules for trying insurance cases if the insurance is issued by a private corporation. What possible basis can there be for that if we are going to deal justly with the veterans? The Government is in the insurance business; why should not the insurance cases of the Government be tried by identically the same rules as those of a private corporation?"

Fortunately for the insured, the amendment proposed in 1932 did not pass; however, as will be seen, an amendment even more vicious than this with respect to those cases not yet filed in the District Courts because the Bureau had failed to "acknowledge disagreement," was passed. This amendment repealed all laws appertaining to term insurance,[1] and prevented the filing of suit in those cases where "disagreement" was not acknowledged prior to the passage of the repealing act.

The repealing enactment is known as the Act of March 20, 1933, the National Economy Act and is cited at Chapter 3, Title 1, Section 17, 48 Statutes 11, and reported in the supplement to U. S. C. A. Title 38, Section 717. This section provides in part as follows:

> "All public laws . . . granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this chapter is enacted . . . provided, That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this chapter and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending . . ."

The above quoted provision in the Act of March 20, 1933, was rushed through Congress under the guise of an "economy measure" when in fact the amount saved, at the sacrifice of the written promise of the Government was, in comparison, inconsequential.

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[1]Title 38, USCA, Sec. 717.

EFFECT OF THIS FURTHER RESTRICTION OF JURISDICTION OF DISTRICT COURTS

Be advised that many of the claims pending before the insuror for decision as to whether or not payment should be made or "disagreement" issued were by reason of the passage of Act of March 20, 1933, quoted above, invalidated in that the insuror refused to pay, by reason of the repeal of certain terms of the contract embodied in the law, and by reason of the restriction of the jurisdiction of the District Courts, so that suit might no longer be brought on these claims, *on which action was not already on file in the United States District Court.* It is estimated that perhaps half of the claims pending before the insuror at the time of the passage of the Act of March 20, 1933, were not filed in the District Court because the insuror had failed to issue "disagreement," though the claim had been pending before the insuror for a long time prior thereto, probably two or more years. This resulted in a situation which on its face is obviously unfair.

In those cases where, by casual review of the information on hand, the insuror was able to determine from its standpoint that the insured had no claim, "disagreement" was issued and action was filed in the United States District Courts prior to March 20, 1933; while on the other hand, in those cases where, in the opinion of the insuror, the insured might establish a case with a grave likelihood of the same being won in the United States District Court in the event payment was not effected administratively by the insuror, *decision on the claim was witheld until the amendatory act of March* 20, 1933, *was passed, repealing all laws granting or appertaining to term insurance.*

In connection with this subject the following effect of the amendment of March 20, 1933,. quoted above, should be considered. In those cases where suit was pending on March 20, 1933, and judgment is rendered for the plaintiff at any time thereafter, the insuror, the Veterans' Administration, may cease to make payments on the ground that the insured is not then permanently and totally disabled within the meaning of the contract. This notwithstanding the finding and judgment of the District Court. In many instances after judgment, and since the passage of the Act of March 20, 1933, the insuror, the Veterans' Administration, has stopped payment of installments to the insured. The insured then has no recourse to the courts for the only policy he had was a term policy of insurance, and the jurisdiction of the District Court has been further limited so as to prevent further action on his policy.

It should be noted, however, that by reason of a Regulation No. 8, promulgated March 31, 1933, the insured, whose insurance installments are discontinued because the insuror, the Veterans' Administration, is of

the opinion that the insured is not then (notwithstanding the judgment of a District Court) permanently and totally disabled in accordance with the terms of the contract, may convert the balance of said insurance to some other type of insurance provided by the insuror.

Let us analyze this a moment. In accordance with the terms of the insurance contract originally carried by the man, termed Yearly Renewable Term Insurance, the insured, in the event he became permanently and totaly disabled in accordance with the terms of the contract, was entitled to installments at the rate of $5.75 monthly for each thousand dollars of insurance carried, as long as he remained permanently and totally disabled, or until 240 installments had been paid, *whichever was the later date.* In many of these cases the insured would draw these installments throughout the remainder of his lifetime.

Now, under Regulation No. 8, promulgated by the President by virtue of authority conferred on him by the National Economy Act of 1933 quoted above in part, if the District Court should find that the insured became permanently and totally disabled in, say, 1920, but judgment was not rendered until 1933, he would receive in accordance with the judgment a sum equal to monthly installments due from some time in 1920 until the date of the judgment. Assuming, (as has been done in numerous cases) that shortly after judgment was rendered, the insuror, the Veterans' Administration, found him no longer permanently and totally disabled, he having received possibly $ 7500.00 by reason of the judgment, would be entitled to convert merely the difference between that sum and the face value of the policy, possibly $2500.00.

It is true that he could sue on the converted insurance and perhaps recover, but then he would merely receive $14.37 per month, this being at the rate of $5.75 for each thousand dollars of insurance carried under the converted policy, and he could not sue for and recover (though in fact he remained permanently and totally disabled and was so found by the District Court), the $57.50 per month to which he is entitled by reason of the terms of his original contract of insurance. This handicap is augmented by the fact that he would have difficulty in interesting an attorney, because the attorney's fee would be limited to $1.43 per month.

CASES MERITORIOUS AS SHOWN BY FEDERAL REPORTER

One has merely to glance at the Federal Reporter to note the constantly increasing number of cases wherein the Courts have sustained the insured in his claim for permanent and total disability benefits under the terms of these contracts. In fact, when the cases get to court in spite of the methods employed by the insuror, a high percentage of them have been won by the insured.

During the fiscal year 1931, we understand that of 2100 suits on war risk insurance disposed of there were 1019 judgments in favor of the government. As every lawyer representing insurance companies well knows, this is a much better record for the defendant than any insurance company can show. This would indicate that at least the government is not at any disadvantage. On the contrary, as pointed out heretofore, the government has a detailed medical history and record on the man from the time he went into the army. It also has a thoroughly trained investigating unit and can and does bring witnesses from all parts of the country.

It is a well known fact that many persons with meritorious cases have been unable to finance the prosecution of them, or have been unable to obtain the services of an attorney to prosecute the suit for them. This is demonstrated by comparing the percentage of loss on the nearly four million policies issued by the government with the percentage of loss of an insurance company, the Metropolitan Life Insurance Company for example.

Up to June 30, 1931 (beginning in 1917) 255,822 claims were presented under the term policies for both death and disability and 29,000 claims under the converted policies issued by the government. Out of the claims presented awards were made on a total of 191,668 on term policies and converted policies together, of which 170,420 were term policies. These awards include those made after suit and judgment for plaintiff. The figures are taken from pages 48 and 96 of the Administrator's report to Congress for the fiscal year ending June 30, 1931 (House Document No. 15).

GREATEST SINGLE REASON FOR SUIT

Without doubt the principal single reason for the necessity of a suit on these contracts of insurance is the inability of the claimant, being without counsel, to obtain and have presented in a logical manner the evidence which has real probative value. If this evidence might be presented to the Veterans' Administration at the time the claim is presented to it by an attorney who may be paid a reasonable fee for services rendered in this connection, no doubt there would be but little necessity for suit in many instances.

Another reason for the difficulty is the fact that what is considered evidence of value in a court is in many instances entirely disregarded by the board or the adjusters at the Veterans' Administration, all of whom are influenced very likely by the medical viewpoint, and in many instances fail to take into consideration the other criterions of the definition of permanent and total disability. Necessarily it requires more evidence to convince a physician of the existence of facts pertaining to the human body

than is required to convince a layman. This is because of the physician's scientific training and the fact that a physician's conception of "proximate cause" differs from the legal conception.

One member of the American Bar Association points out that he alone has settled the following number of claims with private life insurance companies, although the Veterans' Administration has denied permanent and total disability under the contracts of insurance and has refused to make payment (some of these cases, we understand, are in court at this time, although the government and private policies were carried at the time of permanent and total disability):

Metropolitan Life Insurance Co. 4
(no suit filed in any case)
Prudential Life Insurance Co. 1
Aetna Life Insurance Co. 8
Pioneer Life Insurance Co. 5
Southeastern Life Insurance Co. 3
Provident Life Insurance Co. 2
Travelers Life Insurance Co. 2
Shenandoah Life Insurance Co. 1
Reliance Life Insurance Co. 1
Pilot Life Insurance Co. 1
Woodmen of the World 1

No one can believe that the foregoing companies would pay at the expense of stockholders and policy holders claims that were without merit.[1]

THOUSANDS OF CURRENT POLICIES IN EFFECT

It must also be remembered that there are over 600,000 policies issued by the government now in force on which premiums are being paid currently. By restricting the right of the insured to sue in court and by restricting the fees that may be allowed attorneys, the terms of the contract are made in many instances unenforceable. Many persons holding these polices were insurable risks when they were issued to them but are not so today and they are at the mercy of the government. It seems quite wrong for the insuror to materially decrease the value of the insurance contract by restricting the right of the insured to go to court over a dispute over that contract and by preventing the insured from securing the services of an attorney without reducing the premiums and without the consent of the insured.

Naturally all administrative bodies are jealous of their jurisdiction and desire to increase it even at the expense of the jurisdiction of the courts; and here we have the Veterans' Administration, an administrative body, with almost autocratic powers.

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[1]See excerpts statement Major W. D. Workman set out in Appendix.

GOVERNMENT INSURANCE—AIRMAIL CANCELLATION EXAMPLES

The action of the Veterans' Administration in attempting to restrict, and actually effecting the restriction of the jurisdiction of the District Courts over insurance contracts, has created a precedent which will undoubtedly be followed successfully by other government bureaus and departments if these restrictions are permitted to stand.

What about the airmail contracts and the postoffice department? Are the courts to be granted jurisdiction to settle disputes arising between, say, the Tennesee Authority and its consumers or must the dispute be decided by the board of directors of the Tennessee Authority? Would not such a decision be partial to the Tennessee Authority and result in unfairness? Is this practice consistent with the American plan of government? Where jurisdiction has once been conferred on the United States District Courts, is not there grave likelihood that, as in the case of the Veterans' Administration, an effort will be made to restrict that jurisdiction as has the Veterans' Administration?

Needless to say, we do not believe that the final place for settling disputes between the Tennessee Authority and its consumers will be taken from the courts. That being the case, we do not believe that the jurisdiction of the District Courts over insurance disputes should be restricted, even though the government is the insuror.

If the government is to engage in private business, it should carry out that business in accordance with the laws governing private enterprises and not in any manner exploit its customers. In our opinion it certainly has failed in this respect, for a diligent effort has been made over a period of years by its agents, the Veterans' Bureau and later the Veterans' Administration, to wipe out government insurance through legislation. This, we think, is in violation of the contract entered into by the government and the insured.

As pointed out by the Hon. Charles R. Fowler in the American Bar Association Journal for September, 1932, at page 570, if the government wants to quit the insurance business, the business may be taken out of the hands of the government and turned over to a company under the control of the insured. On the other hand, as long as it is in business, it should conform to the practices of that business.

ACTION BY AMERICAN BAR ASSOCIATION NECESSARY

We believe that the above described procedure of a government bureau is but a sample of what we may expect, with government in business, unless attorneys stand unified in defending the right of free and impartial trial in the courts of the land over disputes arising out of contracts.

We believe and trust that the Committee on Jurisprudence and Law Reform will favorably report this vital matter to the Executive Committee and it is trusted that the Executive Committee will concur and present the entire problem to the American Bar Association at its annual meeting next August for approval. We believe that the American Bar Association will then go on record as follows:

(1) Oppose the further limitation of the jurisdiction of the United States District Courts;

(2) Take the position that where the Government has entered business and contracted with its citizens, the United States District Courts should be the place for settling all disputes arising out of said contracts, and that the same laws, procedure and rules should be applied where the United States is a party to said disputes as are applied in other cases;

(3) Urge the repeal of all portions of the National Economy Act of March 20, 1933, limiting the jurisdiction of the United States District Courts over contracts of Government insurance;

(4) Urge the repeal of all laws restricting the right of an insured to employ counsel in all stages of the proceedings where claim or suit is brought on a Government insurance Contract.

Respectfully submitted by the following members of the American Bar Association in good standing:

ALEXANDER, James F., Portland, Oregon
BARBOUR, James J., Chicago, Illinois
BLACKWELL, H. C., Fayetteville, North Carolina
BOWERS, Lloyd G., Birmingham, Alabama
BURTON, J. Chandler, Birmingham, Alabama
CAMERON, Ossian, Winnetka, Illinois
CAMPBELL, Charles S., Jackson, Mississippi
CHENOWETH, R. M., Los Angeles, California
CLAMPITT, C. Wayne, Tucson, Arizona
COLMERY, Harry W., Topeka, Kansas
CUSICK, E. T., Tucson, Arizona
ELLIOTT, Thomas J., Tucson, Arizona
FASIG, Otho S., Chicago, Illinois
FIXEL, Arthur E., Detroit, Michigan
FIXEL, Royland, W., Detroit, Michigan
FOWLER, Cody, Tampa, Flordia
FREY, George, Birmingham, Alabama
GANAHL, Herbert, Los Angeles, California
GRAYSON, L. A., Tampa, Florida
GREENE, Harry L., Atlanta, Georgia

HARSH, G. R., Jr., Birmingham, Alabama
HEWARD, Harlan, Reno, Nevada.
HOFFMAN, Sylvester, Los Angeles, California
KING, Paul H., Detroit, Michigan
KLEIN, Arthur W., Chicago, Illinois
LEHAN, Frank, Los Angeles, California
LYONS, John D., Jr., Tucson, Arizona
McCABE, James, Seattle, Washington
McCLAIN, William A., Atlanta, Georgia
McFALL, Clifford R., Tucson, Arizona
McGOWEN, W. H., Birmingham, Alabama
McKIERNAN, J. O., Chicago, Illinois
McMANIGAL, R. M., Los Angeles, California
MARSTON, George A., Detroit, Michigan
MARTIN, A. W., Chicago, Illinois
MARTIN, Ed. H. S., Chicago, Illinois
MATHIEU, George, Seattle, Washington
MATTHEWS, Ben B., Tucson, Arizona
O'NEILL, James H., Los Angeles, California
OPPENHEIMER, Eugene K., Portland, Oregon
PAINE, Thomas Fite, Aberdeen, Mississippi
PARSONS, Paul G., Birmingham, Alabama
ROBERTSON, Stokes V., Jackson, Mississippi
SHACKELFORD, R. W., Tampa, Florida
SHOENHAIR, T. K., Tucson, Arizona
SIMON, Arthur, Seattle, Washington
SMITH, Arnold T., Tucson, Arizona
SMITH, Cecil C., Chicago, Illinois
SPRINGMEYER, George, Reno, Nevada
STUART, George, Birmingham, Alabama
STUBBS, Thomas, Atlanta, Georgia
SUMMERFIELD, Lester, Reno, Nevada
TIPPETT, S. R., Reno, Nevada
WETTRICK, F. J., Seattle, Washington
WETTRICK, S. J., Seattle, Washington
WHITEHEAD, C. L., Los Angeles, California
WHITMAN, Lloyd C., Chicago, Illinois
WILBOURN, J. C., Meridian, Mississippi
WOODALL, W. Marvin, Birmingham, Alabama

APPENDIX I

EXCERPTS FROM THE STATEMENT OF MAJOR W. D. WORKMAN Greenville, S. C. before JOINT COMMITTEE OF CONGRESS Appointed to Investigate Veterans' Administration Affairs

December 21, 1932

HONORABLE MEMBERS OF JOINT
CONGRESSIONAL COMMITTEE

Gentlemen:

For fear that I may not be able to properly cover the points desired in my alloted time, I am taking the liberty of filing this hastily prepared and poorly drawn memorandum.

* * * * * *

INSURANCE SUITS

This rambling preamble brings me to the matter of suits filed under Section 19, World War Veterans Act, 1924, as amended.

Many insurance suits would never have been filed had not the veteran been unjustly denied all other benefits. The case of Jesse P. Rutledge (C-1 124 426) vs. U. S. is an illustration. About 1929 this veteran appealed to me. He had long and honorable service during the World War, serving in France as a bugler. He is shell-shocked and totally and permanently disabled. The Bureau has denied his claim from discharge to this date. He receives no compensation nor even disabiilty allowance, and has never received any. Being convinced of the merits of his case, in desperation, I had him file claim for his insurance. When his case came on for trial, it was promptly, and properly won by him, before a Judge and jury. Jessie receives his insurance. The Veterans' Administration says he is a moron—that his disabilities are inabilities. Some of you gentlemen served in the World War. It would have been a great war with morons wig-wagging and carrying messages on which hundreds of lives might depend! The point I make is that had Rutledge been receiving compensation, he would probably not have demanded insurance. This was one of the earliest cases tried by me. When it was won, other veterans naturally began to demand their insurance benefits.

Another typical case is that of Matthew G. Gaines (C-1120657) vs. U. S. A. This man was in my regiment in France. He was kicked by a mule. Epilepsy developed. He tried in every way possible to establish his claim for compensation, but was persistently denied throughout the years from about 1919 until I easily proved his insurance claim in court. After he had won his suit, with much personal effort (I had taught this boy in school before the war and his work as a student was brilliant. Now he is a mental and physical wreck) and with the help

of Congressman McSwain, I had this man properly examined and observed at the Diagnostic Center, Cincinnati. Ohio. This institution promptly found that the verdict in court was correct and in this case belated justice has been done, and the Bureau finally admits his total and permanent disability, after these many years.

* * * * * *

I believe that much of the trouble is that doctors instead of lawyers decide the questions of total and permanent disability in the insurance claims. And it appears that no one has ever taken the trouble to give them the definition of total and permanent disability. I know that when trying the case of Thomas A. Julain (C-532 621) vs. U. S. A. one of the most intelligent doctors from the Diagnostic Center stated on direct examination that plaintiff was not by any manner of means totally and permanently disabled. On cross examination I asked him would he rate me, a lawyer, totally and permanently disabled if I had lost both my legs in their entirety. His reply was "certainly not." I then asked that, having lost both legs, I, in addition, lost both arms in their entirety. The reply was "no, I wouldn't so rate you." Needless to say the case was easily won by the plaintiff. I will furnish this name if requested, but I blame the legal division rather than this doctor who probably knows medicine but not law.

I contend that where the Government has absolutely no chance to successfully defend an insurance suit in Court and is convinced of that fact, then taxpayers' money should not be wasted in a sham and hopeless defense. The position of the Solicitor and the Administrator's Board of Appeals is, however, that they are not in the slightest concerned that a jury is certain to find for the plaintiff. Typical of this class of cases denied by the Administration and forced into court is that of Mrs. Raleigh S. Burchett, Guardian of Raleigh S. Burchett (C-279 605) a person of unsound mind vs. U. S. A. Raleigh Burchett was injured in service. The A. G. O. record shows that he was discharged because of epilepsy and that he had convulsions in service. His condition was such that, upon his discharge, he had to be "tagged" and delivered by an attendant to the Police Department at Durham, N. C. He had an epileptic fit while waiting at the station, and was then delivered in the patrol wagon to his mother, who was required to receipt for him. Burchett was an ignorant and uneducated man. His conditon was such that in 1922 he was placed under Committeeship and has continued so from that date. Would any legal member of this Committee have denied his claim had he represented the defendant? The facts in this case were so self-evident upon trial that I moved for a directed verdict for plaintiff, which was, of course, granted by Judge R. H. Watkins.

Another illustration of the waste ot the tax-payers' monies is that of Robert R. Parnell (C-295 288) vs. U. S. A. Parnell served with the 1st and 5th Divisions in France. While with the 1st Division he was gassed and wounded in the left leg. After leaving the hospital, he was transferred to the 5th Division. In the Argonne Forest he was severely wounded, the gunshot causing the tearing of his right hip and urethia fistula. His urinary canal was punctured and in spite of many operations his urine still drains through the puncture. He has no control of his urine at all and no one can employ him because of the disgusting odor and his frequent urination. In addition to this, his tuberculosis, which was found shortly after discharge, and his injured hip, so clearly entitled Parnell to a verdict that I moved for a directed verdict for plaintiff, which, of course, had to be granted and

was promptly granted. No competent lawyer with trial experience, representing a defendant, would have put his client to expense of trial in such a case.

The case of James Sullivan (C-1, 121, 921) vs. U. S. A. is another typical case where the evidence was so conclusive that I moved for a directed verdict which was granted. The Government attorney is instructed in all cases to move for a directed verdict in favor of the defendant. Under the rules of Federal Court when both sides move for a directed verdict, it takes the case from the jury and the Trial Judge must decide. As a rule the jury is the hope of the plaintiff. In the three cases last referred to my voluntary discharge of the jury meant that I only asked the Judge to decide as the Administrator should have decided in the first place.

* * * * * *

If the Administration would use fair tactics with the attorneys for plaintiffs, we could and would help save the Government much money. To work up the case of an ignorant negro or white mill boy or farm boy requires much time and expense on the part of an attorney. Our client would gladly pay us for this if his claim was paid administratively without suit, but if we dare to accept a fee, the Administration shows its appreciation by an indictment. Can we be blamed that as a rule we prepare for trial only after suit is filed? General Hines states that the fees are attractive and well worth working for. You attorneys know that in private practice when cases have to be taken on a contingent basis, that the attorney's fees range from 25% to 50%. Here we have to prove the facts over thirteen years as a rule. The veteran has no money. When we lose we lose all necessary costs of preparations and trial. When we win we receive 10%. No lawyer will call such a proposition attractive and where loacl friendship is lacking many veterans cannot get an attorney to help them. Again the odds against plaintiff are heavily stacked. The Governemnt while expecting everything from plaintiff's attorney refuses to practice even the most common legal ethics. Usually without legal assistance the veteran most go into minutest details, furnishing the opposing side with the names of witnesses and all evidence. The claim is then denied and frequently on the eve of trial the plaintiff is cross examined by an investigator, without the knowledge or consent of his attorney. Were I to practice law as the Veterans' Administration does, the American Bar Association would strike me from its rolls and I would probably be disbarred. Any statement that such investigation, after denial and filing of suit, is for any purpose other than defeating the veteran's claim and entrapping the witness is not borne out by the facts. On the one hand is a pauper veteran, unable frequently to get his witnesses to court, on the other the inexhaustible wealth and authority of the Federal Government. In the court room he usualy has some little lawyer like myself and opposed to him the District Attorney, one or two assistants and from one to four attorneys from the Veterans' Administration. At one term of court I know that seven attroneys were present for the defendant. Incidentally, I won seven out of nine cases at that term. I think the jury had a little sporting blood and appreciated the odds against the veteran and resented the waste of their money in the array of legal talent assembled.

* * * * * *

RE: EST. DOCK THOMPSON (XC-681 396) vs. U. S. A.

This veteran was discharged from service on July 8, 1919, having enlisted on September 1, 1918. His insurance by reason of premiums and the grace period

was in force through midnight, August 31, 1919. When discharged he was suffering with pulmonary tuberculosis, being a negro, he would not immediately report to a doctor, but in October of that same year, 1919, he was examined by a reputable white physician and his tuberculosis was found to be active and of several months standing. The Insurance Claims Council rendered a decision that he was totally and permanently disabled from October 1, 1919 to the date of his death. This typical decision which left in question only the month of September, 1919, resulted in the Director of Insurance sending us a denial of the claim in February of 1932. I quote from this denial:

> "You are informed that a decision was rendered on Feb. 17, 1932, by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at a time when the *contract of insurance was in force*, and therefore the claim has been denied.
>
> "You may consider such denial final for the purpose of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended."

I would certainly have no trouble in winning this case in Court, but as it was some distance down on the docket and because I hated to see tax-payers' money wasted by trial in Court, we presented the case to Mr. Lawlor. In spite of his recommendation and that of the Chief Insurance Attorney in Columbia and the District Attorney's Office, the claim still remained unpaid. I have made three trips to Washington about this matter and finally another investigator of the Bureau, Mr. Edward S. Ragsdale, was detailed to make another investigation of the case. When he completed this, he also recommended payment. The Administrator being finally forced out of an indefensible position in denying such a claim has finally decided that it should be paid and on December 14th of this year I received the following wire from the Solicitor:

1932 Dec. 14 PM 6 43

Received at 101 W. Washington St., Greenville, S. C.

CF 196 53 NL Collect 6 Washington D C 14

MAJOR W. D. WORKMAN, ATTORNEY AT LAW BLUE BUILDING GREENVILLE SOU. CAR.

RETEL DECEMBER THIRTEENTH ADMINISTRATION HAS FOUND DOCK THOMPSON FIFTEEN PER CENT DISABLED FROM DISCHARGE TO OCTOBER ONE NINETEEN NINETEEN AND PT THEREAFTER STOP THIS REVIVES INSURANCE UNDER SECTION THREE NAUGHT FIVE STOP NO DISAGREEMENT EXISTS AS TO CLAIM UNDER THREE NAUGHT FIVE STOP IF SUIT IS DISMISSED INSURANCE WILL BE AWARDED AT ONCE.

ROBERTS SOLICITOR

This is typical of the attitude of resentment which is shown by the Veterans Administration when any attorney exposes such assinine denials. They know the amount of work I have done on this case and they now seek to deprive the attorney of the ten per cent attorney's fee which would be allowed by the Judge. The Administration now admits that Dock Thompson's insurance was in force at the time he became totally and permanently disabled, but they say it was in force because of Section 305 and therefore that that there never was a disagreement. Section 305 is certainly a part of the Act under which the denial was issued and suit brought. The claimants are more than willing to pay the ten per cent attorneys' fee and the Administration probably expects me to dismiss the suit and accept my fee. I would then be violating the law and would probably be next greeted with an indictment for so doing. The Administration expends much money each year in having their investigators check up on the at-

torneys who are attempting to help the veterans instead of expending the money for competent legal advice in veterans' affairs. The claimants do not owe the Administration any thanks for they know that this claim would never have been paid without trial except for my work. Having attempted to prevent the claimants from recovering, the Administration now further delays payment to them on the ridiculous theory that they wish to save them the attorney's fee.

To convince you of this attitude of the present Administrator and his present Solicitor, I refer you to a similar case in which this despicable action was not taken by the predecessor of Mr. Roberts. This is the case of Burwell B. Sullivan (C443 958) vs. U. S. A. The Insurance Claims Council denied the claim and suit was brought. Investigation showed the decision in denying the claim to state that Sullivan was totally and permanently disabled on one day in June, 1920, from active pulmonary tuberculosis, but no per cent disabled from the same disease on the preceding day. I wrote Maj. Wm. Wolff Smith, and called his attention to the ruling. He revived the claim and it was paid under the usual stipulation, rightly allowing attorneys' fees, for the claim had been denied and suit brought—as in the Thompson case.

Mr. Roberts, the Solicitor, remarked recently that the Government shall be just as liberal as an old line Company. I agree with him. But the case of Dr. Jno. W. Parker (C-1, 341, 636) vs. U. S. A. shows that this reasonable theory is not being practiced. Dr. Parker is one of our best citizens. He was discharged from service on account of pulmonary tuberculosis and colitis. He has never received compensation, retired pay, or even disability allowance. His insurance was kept in force until 1927. In that year he reached the end of his rope and had to abandon all efforts to practice his profession. He made claim for total and permanent disability benefits under policies Nos. 4654797-8 which he had with the Pacific Mutual Life Insurance Co. His claim was promptly paid without suit by this Company and he is still drawing his benefits. He had another policy with the Jefferson Standard Insurance Co. and upon presenting his proof, this Company voluntarily paid. In October of this year, the last named Company, being satisfied that Dr. Parker could never recover made a lump settlement with him. In presenting this claim to Mr. Lawlor we agreed that if the Administration would accept some date in 1927 as the beginning point of Dr. Parker's total and permanent disability, we would waive the claim from discharge, although we felt that we could prove his case from that date. In other words, we have only asked the Government to be as liberal as private insurance companies. Dr. Parker has been required to submit to the Veterans' Administration ten times the proof that was required by either of the other insurance companies, but his claim still remains unpaid.

RE: EST. COLUMBUS MILLS (XC-808 953) vs. U. S. A.

This is a claim for the payment of automatic insurance. The veteran was inducted into service on August 2, 1918, in good physical condition. After a short period of service he was discharged because of active pulmonary tuberculosis. He was returned from the Army absolutely totally disabled and lived only until January 5, 1919, when he died of pulmonary tuberculosis. He was not given the opportunity to apply for War Risk Insurance and his widow is clearly entitled to the payment of the benefits until she remarried. The above involved is about Twenty-three Hundred Dollars ($2300). Payment in this case was recommended by Mr. Lawlor, but was held up pending another investigation by Mr. Ragsdale. Mr. Ragsdale has long since completed his investigation, but the claim

still remains unpaid. His investigation only served to strengthen the claimant's position.

I am selecting cases of different types and would like to show the action taken in the case of Felix Tzinieris (C-190 054). This veteran actually was paid his insurance benefits without suit, commencing May 8, 1923. If ever a man were entitled to the benefits he was. He continued to receive his benefits including April 7, 1929 and then because some bureau doctor reported that his tuberculosis was arrested, the Administration discontinued paying him his insurance. The tuberculosis is only one of his many disabilities. The question of insurance is one of industrial activity. The veteran was undoubtedly in a more serious disabled condition in 1929 than he was in 1923 and has been unable to resume his place in the industrial world. It was peculiarly an arbitrary and medical ruling that cut him off. I have recently had him admitted to the Diagnostic Center and he has just returned. Perhaps the Administration will correct the injustice, but to date it still exists. I have several almost identical cases of equal merit and mention two of them, Sam Young (C-278 467) vs. U. S. A. and Charles Copeland (C-9 126) vs. U. S. A.

* * * * * * *

I wish to call your Committee's attention to another recent ruling of the Administrator in an effort to discourage the veteran from claiming his insurance benefits. Under the Worley decision of the United States Supreme Court, when a veteran wins his case, he cannot recover costs or interest against the Government, but the Administrator now rules that where the veteran loses his case even though he be a pauper, that he must pay his costs and that if he is drawing any disability allowance or compensation that the Administration will deduct from these payments the amount of the costs in Court. I never object to a ruling that works both ways, but it does seem unfair to the veteran that if he wins, he pays the costs, and if he loses he also pays. This is causing many men, who deserve their insurance, to abandon their claims for fear that the little pittance that they received will be destroyed by Court costs if the suit is lost. We cannot believe that an organization which is so wasteful of the public money in all other matters is looking after the interest of the public in this ruling, but we know it to be an effort to frighten the veteran and to deprive him of the chance to recover.

I will not weary you much longer, though I have scratched the surface only. From a rapid scanning of my books, I find that I have settled claims for total and permanent disability benefits under group policies (no examination being required when issued) for the veterans whose Government claims I also have. This is another illustration of General Hines' "liberality" and "benefit of the doubt."

METROPOLITAN LIFE INSURANCE CO.

(1) Willie Martin C-1 544 249. T & P by Metropolitan. Not one cent of compensation or even disability allowance from the Bureau. No misconduct. Long service.

(2) Daniel Watson C-1 335 507. T & P by Metropolitan. $12.50 or 25% by Bureau. Disability allowance.

(3) William L. Turner C-454 959. T & P by Metropolitan. 21% compensation by Bureau. Epilepsy basis of both claims.

(4) John Craft. T & P by Metropolitan. Not one cent by Bureau. Absolute wreck. Bureau says "misconduct."

All of the above paid 100%. No suit in any case.

PRUDENTIAL LIFE INSURANCE CO.

Comer J. Lawrence. P & T by Prudential. Statutory award, 25% by Bureau. Accepted $800 on $1,000 policy, in lieu of monthly payments.

AETNA LIFE INSURANCE COMPANY

(1) Jeter Pritchard, C-220 804.
(2) Frances Russell, C-707 599.
(3) John W. White, C-1 117 250.
(4) DeWitt N. Kilby, C-1 330 872.
(5) Ashley Turner, C-520 763.
(6) C. L. Brashier, C-1 338 059.
(7) David E. Stancel, C-527 041.
(8) Ellison K. McGravey, C-1 115 499.

PIONEER LIFE INSURANCE CO.

(1) Coy L. Smith, C-1 542 782.
(2) Arthur Sherman, C-794 756.
(3) Dan Watson, C-1 335 507.
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(5) Wm. L. Turner, C-454 957.

SOUTHEASTERN LIFE INSURANCE CO.

(1) Sam Roach, XC-353 077.
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(1) Walter G. Clardy, C-1 101 433.

PILOT LIFE INSURANCE CO.

(1) J. E. Pruitt, C-907 816.

WOODMEN OF THE WORLD

(1) Albert R. Holcombe, C-1 114 519.

I regret that I did not have time to look up the actual ratings of these veterans as allowed by the Bureau, but I know that John Craft, John W. White, Ellison K. McCrary, Sam Roach, J. R. Griffin and J. E. Pruitt, according to my record received nothing from the Veterans' Administration and I believe that where private insurance companies admit one hundred per cent that the Bureau average would not exceed twenty to twenty-five per cent.

No one can believe that these companies would pay at the expense of stockholders and policy holders claims that were without merit.

Every specific case referred to in this memorandum is open to inspection by your Committee. In closing may I request:

1st. That the proposed change restricting use of testimony in the trial of insurance suits be not approved.

2nd. That the law be amended so as to permit the retained attorney to accept a fee of not exceeding ten per cent of the recovery, where an insurance claim is paid administratively.

3rd. That the law be amended to permit the compromise of insurance claims and suits, the attorney's fee being in all cases ten per cent of the accepted compromise offer.

4th. That the Administrator be required to select as the heads of his legal department attorneys with trial experience and adequate legal training.

5th. That the "misconduct clause" be amended in line with the recommendation of the American Legion.

6th. That where plaintiff loses his case and is in fact a pauper, that the Administration be prevented from deducting costs from compensation or disability allowance.

With many thanks for your courtesy in hearing me, I remain,

Respectfully yours,

(signed) W. D. WORKMAN,
Greenville, S. C.

* * * * * * *

APPENDIX II

Suggested Changes in Existing Legislation to Take Care of Recommendations Set Out Herein

1. A Bill to Amend Title 38, U. S. C. A., Section 551:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That Section 500 of the World War Veterans' Act of 1924, as amended (Title 38, U. S. C. A., Sec. 551), is amended so that the first proviso of said section shall read as follows:

"Provided however, That whenever claim is filed on a contract of insurance, the insured may contract with any attorney admitted to practice in the State wherein the claimant resides for services to be rendered in presenting the claim to the Veterans' Administration, and in the event of settlement of said claim, the attorney shall be allowed and paid by the Veterans' Administration out of the money found to be due the claimant the sum of five per cent of the amount so found to be due if said sum of five per cent exceeds the amount of One Hundred Dollars; if said sum is less than One Hundred Dollars, then the said claimant may contract with his attorney for payment of a fee of One Hundred Dollars or less and that such fee be so paid said attorney in the event of recovery of all or a part of said claim:

"Provided further, That whenever a judgment or decree shall be rendered in an action brought pursuant to Section 445 of this Chapter, the court, as part of its judgment or decree, shall determine and allow reasonable fees to the attorneys of the successful party or parties and apportion same if

proper, said fees not to exceed fifteen per centum (15%) of the amount recovered, payment to be made by the Veterans' Administration under the judgment or decree at a rate not exceeding fifteen per cent (15%) of each of such payments until paid: Provided further, however, That in the event that said attorneys' fees as last above mentioned, due at the time of entry of such judgment, are less than Three Hundred Dollars, the sum of Three Hundred Dollars shall be paid said attorneys out of the money found due claimant as of the date of judgment, and said sum shall be credited on attorneys' fees allowed by court, as aforesaid, the balance of said fees to be paid at a rate not exceeding fifteen per cent (15%) of each of the payments to be made to claimant thereafter: Provided further, That in addition thereto, the court shall allow, as part of its judgment or decree, an additional fee of $25.00 for the attorneys of the successful party or parties and apportion same if proper, for each deposition taken in good faith for or on behalf of the successful party or parties:

"Provided further, That the plaintiff or plaintiffs in any action brought pursuant to Section 445 of this Chapter and their attorneys of record, or either of them, shall be permitted to inspect, within reasonable hours, all medical and hospital reports and records appertaining to said plaintiff or plaintiffs in the possession or under the control of the Veterans' Administration, the Adjutant General of the United States and hospitals or facilities of the Veterans' Administration and U. S. Public Health Service and that such inspection may be made six months following the filing of any such suit or at any reasonable times within the six months prior to the date of trial, whichever date is the earlier: Provided further, That in the event the insured is dead, incompetent or insane at the time inspection is requested, the party requesting such inspection shall also be permitted to inspect all statements or other writings made by or executed by such insured: Provided further, That the District Court may and shall issue process for the enforcement of such right of inspection of all the documents physically present within its jurisdiction whether said suit is pending before it or is pending in any other District."

II. A Bill to Amend Title 38, U. S. C. A., Section 445:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That Section 19 of the World War Veterans' Act of 1924, as amended, (U. S. C. A., Supp. V, Title 38, Sec. 445) is amended by adding at the end of said section the following:

"The Veterans' Administration shall deny or allow a claim for insurance benefits within six months after the date of the passage of this Act, or within six months after receipt of demand therefor, whichever shall be the later date, and failure to do so may, at the option of the person claiming such benefits, constitute a disagreement within the meaning of this section: Provided, however, That no suit heretofore filed shall be dismissed for lack of jurisdiction: Provided further, That if the claimant has filed suit without disagreement, the Veterans' Administration shall have six months after the passage of this Act or eighteen months after said suit was filed, whichever is the later date, within which to deny or allow said claim, and all proceedings shall be stayed in said suits so filed for said period, and if said claim is not allowed by such later date, said abatement and stay shall cease and the cause shall proceed to trial for all purposes as if a final

and conclusive disagreement existed in fact: Provided further, That in the event plaintiff recovers judgment after suit pursuant to this section, plaintiff shall be allowed his costs and same shall be made a part of the judgment."

III. A Bill to Amend Title 38, U. S. C. A., Section 717 (Act of March 20, 1933, Chapter 3, Title I, Section 17, 40 Stat. 11):

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That Title 38, U. S. C. A., Section 717, (Act of March 20, 1933, Chapter 3, Title I, Section 17, 40 Statutes 11) is amended by striking therefrom the first proviso and inserting the following in its place and stead:

"Provided, That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of the enactment of this Chapter, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or the filing of any suit on yearly renewable term insurance in a court of competent jurisdiction on which claim has been heretofore filed with the Veterans' Administration, and in said cases where the claim has been filed with the Veterans Administration the said insured shall have six months after the passage of this Act in which to file suit in the event that disagreement has been acknowledged by the Veterans' Administration prior to the date of this Act; otherwise, said insured shall be entitled to file suit within the time prescribed by Section 19 of the World War Veterans' Act (Title 38, U. S. C. A., Sec. 445)."

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NOTE AND COMMENT

TREATY INTERPRETATION—A COMPARATIVE STUDY OF VIEWS EXPRESSED BY THE UNITED STATES AND CANADIAN COURTS ON THE WEBSTER-ASHBURTON TREATY (1842)

In 1796 the Supreme Court of the United States rendered its first important decision interpreting a treaty.[1] Since then many such cases have been decided, and the principles of treaty construction asserted by the court at various times have been reiterated in later decisions. The most recent case involving treaties, *Pigeon River Improvement, Slide & Boom Co. v. Cox,*[2] is no exception, and also affords an excellent opportunity for a comparative study of the legal position of treaties in the United States and Canada, and the principles of treaty construction applied by the courts of the two countries.

In the United States the constitutional provision succinctly makes a treaty a part of the supreme law of the land enforceable in the courts. A treaty once ratified and proclaimed is as much law as an act of Congress duly signed by the President. This is not true in Canada nor in any of the Dominions. In Canada a treaty is regarded as part of the law to be enforced by the courts only when it has been implemented into the laws of Canada, and, of course, this requires parliamentary action. If such action is lacking the treaty has no binding force, municipally speaking, although from an international point of view there is no question but that the Canadian government is responsible for the fulfillment of its treaty obligations.

Pigeon River Improvement, Slide & Boom Co. v. Cox, decided by the Supreme Court of the United States last January, is of particular interest for several reasons. There was a marked diversity of opinion existing among the several American courts. There was a marked diversity of opinion among the Canadian Courts. Both ultimately arrived at the same conclusion, but reached it by different premises. These circumstances, taken together, afford an unusual opportunity for comparative study of American and Canadian principles of treaty interpretation. Let us examine the facts in the Pigeon River case.

The Pigeon River Company was incorporated under the laws of the State of Minnesota which empowered it "to improve streams by erecting sluiceways, booms, dams and other works." As the Pigeon River was a boundary river betweten Minnesota and the Province of Ontario the company took possession of the Minnesota side to make improvements. A Canadian corporation was organized at the same time which similarly improved the Canadian side of the river.[3] Before this was done the river

[1] *Ware v. Hylton,* 3 Dall. 199, 1 L. ed. 568, (1796).
[2] 78 L. ed. 695 (1934).
[3] See *Re Arrow River & Tributaries, Slide—Boom Co.,* (1932) 2 Dominion L. R. 250.

had been impassable because of falls and rapids; after the erection of dams and sluiceways, however, it was possible to float timber products down the river. The Pigeon River Company charged tolls for the use of the improvements.[4]

The case was brought because the defendant, a Canadian corporation, had floated pulpwood and railway ties down the river, but refused to pay the tolls. The defendant tacitly admitted that the tolls alleged in the complaint were the "reasonable and uniform tolls" which the Pigeon River Company had established, so that there was no question raised as to reasonableness or discrimination. Moreover, the Pigeon River, prior to the improvements here involved, "as alleged in the complaint and admitted by the demurrer, 'was at all times incapable of use for the driving, handling and floating of logs, pulpwood and timber'." The only question was whether in the light of Article 2 of the Webster-Ashburton Treaty of 1842[5] any tolls whatever could be charged. After defining the international boundary this article was as follows:

> It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, *shall be free and open to the use of the citizens and subjects of both countries.*[6]

The defendant contented that the Pigeon River, as a boundary stream and as one of the "water communications" described in the treaty, must be kept "free and open" to the use of the citizens of both countries, and that the imposition of tolls was contrary to this provision.

The particular point involved, therefore, was the application of the words of the Webster-Ashburton treaty "free and open" to the Pigeon River, at points where the river was impassable. The Court did not think that the terms of the treaty clearly prohibited the imposition of tolls for improving the stream. Since the treaty provision was ambiguous, the Court declared that it was appropriate to "look to the practical construction" which had been placed upon it.

In looking to the practical construction the Court first discussed the power of the State of Minnesota "to establish such an aid to commerce." It held that the state possessed this power "in the absence of a violation of treaty, or of conflict with an act of Congress."[7] Second, the Court was of the opinion "that the improvements were made with the consent of Congress" inasmuch as the Act of March 3, 1901,[8] expressly authorized the Pigeon River Company to improve the river and to impose a reasonable charge for the passage of timber. The Court then went on to say that although it did not regard this act as "intended to abrogate the provision of the Webster-Ashburton Treaty," yet in so far as it "specifically authorized the charging of tolls for the use of improvements on the Min-

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[4]Cf. Pigeon River Improvement, Slide & Boom Co. v. Cox, F. (2d) 567 (1933).
[5]8 Stat. 574; 1 Malloy, Treaties, 652, 653.
[6]The italics supplied.
[7]78 L. ed. 695, 704.
[8]31 Stat. 1455.

nesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected."[9]

Thus, the Court regarded the action of Congress, "following that of the State, as a practical construction of the treaty as permitting these works and justifying the charge."[10] To substantiate further its final conclusion, the Court examined the later treaty of 1909[11] between the United States and Canada and found that the treaty recognized the improvements here in question.[12] Nor had either of the two countries ever made any representations to the other as to a breach of obligations by reason of the making of the improvements or the imposition of tolls.

In comparing the conclusions reached in this case with previous holdings of the Court, it would appear that tolls could not have been imposed upon the Canadian corporation merely upon the authority of state law if such imposition constituted a violation of the "free and open clause" of the treaty of 1842.[13] The Court thought, however, that since Congress had expressed its approval of the Pigeon River improvements, and the charging of tolls, and since the river was in part impassable, the state had not exceeded its authority, and its action, coupled with that of Congress, constituted a practical construction of the treaty. But the Court asserted, citing its previous holdings to that effect, that if the act of Congress had conflicted with the provision of the Webster-Ashburton treaty the statute would have abrogated the treaty provision. Nevertheless it stated that the intention to abrogate or modify a treaty is not to be

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[9]78 L. ed. 695, 705. The Court cited The Cherokee Tobacco (Boudinot v. United States), 11 Wall. 616, 621, 20 L. ed. 227 (1871); Head Money Cases (Edye v. Robertson), 112 U. S. 580,28 L. ed. 798 (1884); Cook v. United States 288 U. S. 102, 120, 77 L. ed. 641 (1933).

[10]It should be emphasized, however, that in this case the Court did not itself place the "practical construction" upon the treaty. "By the act of March 3, 1901, Chap. 878, 31 Stat. 1455 (which apparently was not brought to the attention of the Circuit Court of Appeals), the Congress expressly authorized the Pigeon River Company to improve the river in order that it might be rendered navigable for floating logs, to erect dams and other works necessary for that purpose, and to impose a reasonable charge for the passage of all timber save that which was cut from the adjoining Grand Portage Indian Reservation." 78 L. ed. 695, 704.

[11]36 Stat. 2448, 3 U. S. Treaties (1909), 2607.

[12]78 L. ed. 695, 705-706. "By Article I of this treaty the Parties formulated their agreement 'that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to ships, vessels and boats of both countries equally.' The treaty expressly refers to uses and obstructions of boundary waters which had theretofore been permitted and sets up an International Joint Commission with jurisdiction to deal with future uses and obstructions, as stated. Article III of the treaty thus provides: 'It is agreed that in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, . . . shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission to be known as the International Joint Commission'."

[13]The Supreme Court has, in practically every instance, upheld treaties and declared conflicting state laws inapplicable. See Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568 (1796); Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666 (1830); Hauenstein v. Lynham 100 U. S. 483, 25 L. ed. 628 (1879); and Nielsen v. Johnson, 279 U. S. 47, 73 L. ed. 607 (1929).

lightly imputed to Congress[14] and that in the present case it was not proper to infer that Congress considered the tolls inconsistent with the treaty.[15] Furthermore the Court inferred that the later treaty could have overruled this particular provision of the Webster-Ashburton treaty and this inference, of course, would have followed international practice.

By this decision the Supreme Court reversed the decision of the lower court which both in this case and in *Clark v. Pigeon River Improvement, Slide & Boom Co.*[16] had denied the power of the State of Minnesota to authorize the Pigeon River Company to impose tolls. The main point of difference seems to be that the lower court was either unaware of the Act of Congress of 1901 or else considered it unimportant to the decision. Judge Kenyon, who delivered the opinions of the lower court in both cases, looked to the words of the treaty, interpreting them according to what he considered to be the correct principles of treaty construction. The Supreme Court, however, did not itself interpret the treaty, but asserted that Article 2 had received a practical construction both by state statute and act of Congress and that the Court was bound to follow this construction. Whether the Supreme Court would have approved the decision of the lower court had there been no act of Congress can only be a matter of speculation. Certainly the principles of treaty interpretation asserted by the lower court were those which have been frequently asserted by the Supreme Court.[17]

In upholding the right of the Pigeon River Company to charge tolls for the use of its improvements the Supreme Court of the United States rendered a decision in agreement with that of the Canadian Supreme Court in *Re Arrow River and Tributaries, Slide & Boom Co.*[18] The facts in this case were similar to those in the Pigeon River case.[19] The right of the Arrow River Company, a Canadian corporation, to charge tolls for the

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[14]The Court cited the cases of Chew Heong v. United States, 112 U. S. 536, 549, 28 L. ed. 770 (1884); United States v. Payne, 264 U. S. 446, 449, 68 L. ed. 782 (1924); Cook v. United States, 288 U. S. 102, 77 L. ed. 641 (1933).

[15]78 L. ed. 695, 705.

[16]52 F. (2d) 551 (C. C. A. 8th Cir., 1931).

[17]The decision in the Clark case contains a good summary of these principles. "The Court thinks the words 'as now actually used' refer only to Grand Portage. Any other theory would give the treaty a narrow and apparently distorted construction. Good faith between nations requires carrying out treaty obligations according to the intentions of the contracting parties. . . . Treaties are to be fairly and liberally construed to carry out the intention of the parties thereto at the time the treaty was written and adopted." 52 F. (2d) 551, 556. Judge Kenyon quoted from the following Supreme Court decisions: Jordan v. Tashiro, 278 U. S. 123, 73 L. ed. 214 (1928); Nielsen v. Johnson, 279 U. S. 47 (1929); Sullivan v. Kidd, 254 U. S. 433, 65 L. ed. 344 (1921). The Court will look to diplomatic correspondence and travaux preparatories for evidence of intention in cases where the wording of the treaty is not clear. Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255 (1923). See, also, the recent case, Cook v. United States, 288 U. S. 102 (1933).

[18](1932) 2 Dominion L. R. 250.

[19]The decision of the Canadian Supreme Court upholding the imposition of tolls on the Canadian side of the river had been rendered in 1932. In Pigeon River Co. v. Cox the Circuit Court of Appeals had forbidden the imposition of tolls on the American side of the Pigeon River. 63 F. (2d) 567 (1933). With these two decisions in mind the United States Supreme Court made the following statement in Pigeon River Co. v. Cox, 78 L. ed. 695, 703: "We have the extraordinary situation that as to these improvements at the same place on the boundary

use of the improvements which it had made on the Canadian side of the Pigeon River was contested in the Ontario courts. Upon appeal to the Supreme Court of Canada that body approved the imposition of the tolls.[20] The reasoning of the Canadian Supreme Court, however, differed materially from that of the United States Supreme Court, largely because of the different legal position of treaties in the two countries. The majority of the Court held that the Lakes and Rivers Improvement Act authorized the imposition of the tolls, and this was the controlling factor in the decision. One judge was of the opinion that the act was at variance with the treaty on this point, but he did not consider that this invalidated the act.[21]

> The Act must . . . be held to be valid unless the existence of the treaty of itself imposes a limitation upon the provincial legislative power. In my opinion the treaty alone cannot be considered as having that effect. The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power.

He adds:

> For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. . . .

In this respect our law would seem to differ from that prevailing in the United States.[22]

Chief Justice Anglin agreed with the majority decision, but would have preferred basing the decision "upon a holding that, upon the true construction of the clause of the Ashburton Treaty it was merely meant to ensure to the citizens of both countries equality of rights in regard to the water communications."[23] Thus, to him the purpose of the treaty

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stream—improvements necessarily complementary to each other—the Ontario Company may impose charges upon citizens of the United States for the use of its works on the Canadian side of the line while the Minnesota Company may not charge citizens of Canada for the use of its corresponding works on the Minnesota side."

[20]The Ontario court before which the case was first brought did not deny the right of the Arrow River Company to charge tolls. (1930) 65 Ont. Law Rep. 575. On appeal, the Second Divisional Court set aside the order of the Chambers Judge. (1931) 66 Ont. Law Rep. 577. The Supreme Court of Canada, in turn, reversed this court. (1932) 2 Dominion L. R. 250.

[21]Lamont, J., (1932) 2 Dominion L. R. 250, 259.

[22]*Ibid.*, 250, 260.

[23]*Ibid.*, 250. Although the lower court in Ontario did not base its decision upon the treaty, but upon the Lakes and Rivers Improvement Act, the court commented upon the proper construction to be placed upon the treaty. Reference was made to two United States decisions on the meaning of "free and open" as applied to water communications. Benjamin v. Manistee River Improvement Co., 42 Mich. 628, 4 N. W. Rep. 483 (1880), and Osborne v. Knife Falls Boom Co., 21 N. W. Rep. 704, 32 Minn. 412 (1884). Declaring that the United States decisions were not binding, the Canadian court nevertheless "commended" the reasoning.

was to prevent discrimination against the citizens of the other country and not to prohibit any tolls whatsoever.

Because of the different position of treaties in Canadian law[24] the question of reconciling treaties and statutes is of much less significance than in the United States and consequently there are fewer occasions for the Canadian courts to apply principles of treaty interpretation. Thus, we do not find a large number of Canadian cases laying down such principles. Nevertheless the principle of good faith is occasionally mentioned as a controlling factor in the decision.[25] As in the United States courts the intention of the parties is also a primary consideration in construing treaties.[26]

JAS. J. LENOIR

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[24]See, also, Re Arrow River & Tributaries, Slide & Boom Co., (1930) 65 Ont. Law Rep. 575, 582, 585.

[25]Note the following quotation from Re Arrow River & Tributaries, Slide & Boom Co., (1931) 66 Ont. Law Rep. 577. "The sovereign will not be considered as enacting anything that will conflict with his plain duty, unless the language employed in the statute is perfectly clear and explicit, admitting of no other interpretation. . . . If the legislation can fairly be read in such a way as to reject any imputation of breaking faith, it must be so read."

[26]See Re Arrow River Co. (1932) 2 Dominion L. R. 250, 255-256.

IMPLIED WARRANTIES IN THE SALE OF FOOD[1]

Over a period of many years the Mississippi courts have changed little in their decisions concerning implied warranties of sales, especially in regard to the sale of foods. Early in the legal history of Mississippi the Supreme Court laid down the principles of implied warranties. This was in the case of *Otts v Alderson.*[2] While this case is not cited as an authority in any of the later decisions, that is those cases concerning the sale of food, yet the courts have come to the same conclusions that were reached in this case. Here a slave had been purchased. The question involved was whether an implied warranty of soundness could be raised in such sale. Quoting from the decision of the court: "On this subject, the general rule is 'that the purchaser buys at his own peril, *caveat emptor,* unless the seller either gives an express warranty or unless the law imply a warranty from the circumstances of the case or the nature of the thing sold; or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale.' Story on Sales, 293.

"No particular form of words is necessary to the creation of a warranty. Any affirmation or representation in relation to the article sold is sufficient if it be intended to have that effect. *Kinley v. Fitzpatrick,* 4 How. 59. There is certainly a tendency in the modern cases to enlarge the responsibility of the seller, and to extend the doctrine of implied warranty. The growing spirit of commerce seems more and more to require that every vendor of an article should be held answerable for its merchantable quality.

"Still the general rule is as before stated, and every deviation from it, must be regarded as merely an exception. The exceptions have, by a late writer, been arranged under five distinct classes. Ist. A warranty is implied that a seller has title. 2nd. There is a warranty that the articles are merchantable, when from their nature or situation at the time of the sale, an examination is impracticable. This rule is most frequently brought into requisition where the seller is the manufacturer. 3rd. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied that it is reasonably fit and proper for such purpose and use, as far as an article of such can be. 4th. A warranty is implied against all latent defects in two cases: (1) Where the seller knew the buyer did not rely on his (the buyer's) own judgment, but on that of the seller, who knew or might have known of the existence of defects; and (2) Where a manufacturer or producer undertakes to furnish articles of his own manufacture or produce in answer to an order. 5th. That goods sold by sample correspond with the sample in quality."[3]

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[1]Implied warranties in Mississippi are not governed by statute but are founded solely upon the common law. However, Mississippi decisions are in line with the weight of authority.

[2]10 S. & M. 476 (1848).

[3]Otts v. Alderson, *Ibid.*

A comparison of this case with the later cases herein discussed will show how nearly similar are the decisions reached. These cases have come into existence, no doubt, because of the enormous amount of foodstuffs that have been put on the market in cans, bottles, paper cartons, and other similar forms of packings. The purchasers having no opportunity to inspect the foods thus bought, the protection of the courts has been invoked through the method of raising implied warranties.

The earlier cases relate to the sale of animal foodstuffs. Mississippi courts, not having a very high regard for animals other than man, refuse to raise implied warranties for the benefit of purchasers of animal foodstuffs. Thus in the case of *Dulaney et al v. Jones & Rogers*[4] the court upholds the theory that purchasers of food for human consumption should be so protected but denies such protection to purchasers of food for animal consumption. Said the court: "It is argued with much ability by the appellees, that an implied warranty of soundness arises only in cases where the food sold is for human consumption. After careful consideration of the question, our conclusion is that, according to the weight of authority in this country, there is an implied warranty of soundness in the case of the sale of provisions intended for human food, but with food for other purposes there is no implied warranty of soundness. This is put upon the grounds of public policy, the controlling reason being the regard for human life and for human health."[5] Of course, the purchaser still has the right to recover damages for any injury, which may have occurred to his animals, caused by their eating foodstuffs with foreign substances in them, by bringing an action in tort.

Contemporaneous with these cases on animal foodstuffs are a number of decisions which may be classed under the heading "Coca-Cola" cases. In each of these some one had been injured in some manner because of drinking beverages, generally coca-colas, which contained some foreign substance. The theory in each case is that the manufacturer is liable on the implied warranty of fitness for human consumption.[6] The cases just referred to developed from *Jackson Coca-Cola Bottling Company v. Chapman*[7] in which the court held thus: "When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious."[8]

Two of the cases cited, while affirming the liability of the manufacturer, developed other interesting points which have to do with this

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[4]100 Miss. 835, 57 So. 225 (1912).

[5]Dulaney et al. v. Jones & Rogers, *supra.* Further authority for this same reasoning may be found in the cases of Dunagin-Whitaker Co. v. Montgomery, 117 Miss. 666, 78 So. 580 (1918), and Royal Feed and Milling Co. v. Thorn, 142 Miss. 92, 107 So. 282 (1926).

[6]Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Coca-Cola Bottling Works of Greenwood v. Simpson, 158 Miss. 390, 130 So. 479 (1930).

[7]106 Miss. 864, 64 So. 791 (1914).

[8]Jackson Coca-Cola Bottling Company v. Chapman, *supra.*

question. In the case of *Grapico v Ennis*[9] the court declared the liability of the manufacturer but stated that the plaintiff could not recover. The court declared the plaintiff was in pari delicto with the seller as the reason for not allowing recovery and also strongly intimated the following: (The drink in this case was purchased on Sunday.) An action on implied warranty of an article is an action ex contractu and in Mississippi all contracts made on Sunday are void. Thus since the contract was void the plaintiff had no grounds for suit on implied warranty. In *Coca-Cola Bottling Works v. Lyons*[10] a woman who was the recipient of a gift of a bottle of coca-cola was made ill by the drinking thereof. In allowing her to recover the court made this statement: "We have carefully considered the question, and it appears to be a new proposition in this state, so far as we are able to discover, and we are of opinion that the position of appellant is not maintainable, because, as we see it, the bottle of coca-cola which Mrs. Lyons drank was at least a gift from her friend Mrs. Jackson, and since the gift carried with it the title, and the implied warranty runs with the title, Mrs. Lyons was the owner, and rightfully in possession thereof as one of the public when she drank the coca-cola, and that the manufacturer impliedly warranted the purity of the drink to such of the public as became the rightful possessor and the owner of the coca-cola."[11] This case establishes the fact that the implied warranty goes to the ultimate consumer even though such person is not the purchaser of the article.

Further discussion of this question brings in three late cases: *Curtiss Candy Co. v Johnson*[12]; *Kroger Grocery Co. v. Lewelling et al*[13]; and *Cudahy Packing Co. v. Baskin*[14]. Though these cases hold as the others, that the manufacturer is liable on the implied warranty, by them may be shown that the courts are gradually broadening the scope of implied warranties. The Curtiss Candy Co. case was one in which the plaintiff purchased a bar of candy in a Curtiss Candy Co. wrapper. Upon eating the candy he found that it contained glass from which he suffered injury. In the court's holding the theory is placed on this basis: "Prima facie, then, when a manufacturer adopts a trade name for an article and puts it upon the market to be used by human beings as food, as to all hidden imperfections therein the consumer must be deemed to have relied on the care of the packer or manufacturer, or the warranty which is held to be implied by the latter. Prima facie, then, when an article of food is sealed, and placed upon the market for human consumption, it is as though the consumer had bought directly from the manufacturer; and when, as ordinarily and usually, he places his name on the original package, and it is shown that the article was purchased as such, and is intact, then a case is made for the jury, and the jury are warranted in adopting the view that the article was manufactured as represented by the one manufacturing it, unless and until the manufacturer shall offer evidence to the contrary."[15] In the Kroger Grocery Company case the court, while af-

[9] *supra.*
[10] *supra.*
[11] Coca-Cola Bottling Works v. Lyons, *supra.*
[12] 163 Miss. 426, 141 So. 763 (1932).
[13] 165 Miss, 71, 145 So. 726 (1933).
[14] .....Miss....., 155 So. 217 (1934).
[15] Curtiss Candy Co. v. Johnson, *supra.*

firming the manufacturer's liability, denied that the retailer was liable to the consumer on this same theory, the reason being that the retailer is in no better position than the purchaser to tell the condition of the food when it was sold. It would be different if the food was not packed or concealed from examination in any way. In that case the retailer would be as much liable as the manufacturer since the reasoning for his previous protection disappears.[16] The case of *Cudahy Packing Co. v. Baskin*[17] provides that the burden of proof shall be placed on the consumer to show that the food contained the foreign substance when it left the manufacturer. Here the food was sausage purchased in a large can and opened by the retailer. The consumer purchased from the opened can. Said the court: "Where food does not reach the consumer in original container, consumer must prove that deleterious matter was in food when it left manufacturer's possession or control."[18]

These cases lead to but one conclusion—When the consumer proves that he purchased the food, that it was boxed, canned or packed so that it could not be tampered with or examined, that therein was foreign and deleterious substance, and that from the eating of such food he suffered injury, then he has made out a prima facie and, from a practical standpoint, an unanswerable case.

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[16]The various states differ on the question of holding the retail dealer liable on the implied warranty. "The majority of the cases in those jurisdictions in which the Uniform Sales Act has not been adopted, or in which the cases preceded the adoption of such act, deny that a retail dealer impliedly warrants that food sold in sealed cans is wholesome and fit for consumption by the purchaser." 90 A. L. R. 1270.

So in Kentucky: "Neither seller nor purchaser can otherwise judge of its condition (canned goods) and in this respect both stand upon equal footing. So that the rule of common law has been modified to meet the changed conditions, and it is now generally recognized that, where the article is one of general use and put up by a reputable manufacturer or packer in a sealed can, the exterior of which is in good condition, the retailer is not responsible to his customer for defective or unwholesome condition of the contents unless and except at the time of the sale he expressly warrants the same to be free from defects." Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925).

Griffin v. James Butler Grocery, 108 N. J. L. 92, 156 Atl. 636 (1931), and Bowman v. Woodway Stores, 258 Ill. App. 307 (1930) under the Uniform Sales Act hold the retailer liable on implied warranty in sale of canned goods. But even in the states governed by statutes there seems to be a disagreement as to whether or not the retailer should be held liable, as in Aronowitz v. F. W. Woolworth, 236 N. Y. Supp. 133 (1929). This was a sale of canned tuna fish. The court stated: "A purchaser is undoubtedly fully aware of this fact (that goods are canned) so that in such instance the mere purchase standing by itself does not conclusively establish reliance by the purchaser upon the supposed skill of judgment of the seller as to the contents of the sealed can."

The Mississippi Courts follow the rule which seemingly gives greater and more equal justice to all parties concerned. Holding the manufacturer liable prevents circuity of action, and places the blame where it rightly belongs in the first litigation.

[17]*Supra.*

[18]Cudahy Packing Co. v. Baskin, *supra.*

RECENT IMPORTANT DECISIONS

CONSTITUTIONAL LAW—POLICE POWER—IMPAIRMENT OF THE OBLIGATION OF A CONTRACT.

Under a statute passed by the Arkansas Legislature insurance moneys were exempt from seizure for the payment of debts of a resident of the state. The law was justified on the ground that it was emergency legislation. HELD: The statute was unconstitutional as impairing the obligations of a contract because no time limit was provided in the statute. *Worthen v. Thomas* 54 S. Ct. 816, 78 L. Ed. 975, (1934).

It has often been said that this case limits the broad doctrine laid down in the famous *Minnesota Mortgage Moratorium Case,*[1] in which the Court held that when an economic emergency exists, the state legislature may, under the exercise of the police power, impair the obligations of a contract so long as the legislation is addressed to a legitimate end and the measures taken are reasonable to the attainment of that end.[2] The Minnesota statute, leaving within the discretion of the judiciary whether or not the period of equitable redemption of each mortgage was to be extended until May 1, 1935, was held to be a reasonable impairment of the obligations of the contract on the following five grounds: The first was that[3] an emergency existed; the second, that the legislation was addressed to a legitimate end, and that it was beneficial to society as a whole and not to one group of individuals; the third that the relief was justified in view of the nature of the contracts in question; the fourth that the conditions upon which the period of redemption was extended were reasonable, mainly because the integrity of the contract was maintained, and the mortgagor was compelled to pay rent to the mortgagee-vendee during the period of extension; and the fifth, that the legislation was temporary in operation.

The Worthen case lays down the proposition that emergency legislation making no provision as to the length of time it is to last, nor providing for the protection of a creditor cannot be sustained when it impairs the obligations of a contract. This decision may be reconciled with that in the Minnesota case. Emphasis is placed here upon the fact that the Arkansas statute places no limitation upon the time that it is to run, nor does it give any benefit whatsoever to the creditor, but leaves him without a remedy altogther. The Court differentiates this case from the Minnesota case in that there the length of time the equity of redemption was extended could not be more than two years, while in this case no period of time was mentioned at all. Also in the Minnesota case the mortgagor was to pay $40 per month to the mortgagee-vendee, while in the Arkansas statute no provision was made for payment to the creditor of the beneficiary in any way at any time. In neither of the cases did the Court question the existence of an emergency.

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[1]Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481 (1934).

[2]Supplement to DODDS' CASES ON CONSTITUTIONAL LAW by WALTER F. DODD page 159.

[3]Home Building & Loan Association v. Blaisdell, *supra* 78 L. Ed. 432.

The Justices joining in the dissenting opinion of the Minnesota case said: "A statute which materially delays enforcement of the mortgagee's contractual rights of ownership and possession does not modify the remedy merely; it destroys for the period of the delay, all remedy so far as the enforcement of that right is concerned."[4] They refute the position that the provisions of the Constitution can be violated under some conditions and not under others. The opinion of the dissenting Justices cannot be expressed in better words than those of Mr. Justice Sutherland in the specially concurring opinion in the Worthen case in which he said, "We reject as unsound and dangerous doctrine, threatening the stability of the deliberately framed and wise provisions of the Constitution, the notion that violations of the provisions may be measured by the length of time they are to continue, or the extent of the infraction, and that only those of long duration or of large importance are to be held bad." These statements are the basis for the position that there is no distinction between the Worthen case and the Minnesota case. The Court in the opinion of the Minnesota case in express words rejected this reasoning, that the extent of the infraction was controlling but said that the end to be attained and the means used to atain this end were controlling factors in determining whether or not the statute was valid.[5]

Thus it is evident that in the Worthen case the Court is attempting to justify itself for the decision rendered in the Minnesota case and, at the same time retrench itself against further cases similar to the Worthen case. Being on the defensive in both cases, the Justices who dissented in the Minnesota case and specially concurred in the Worthen case necessarily did not change their views in the least, but clung tenaciously to the same position throughout. But the division in the membership of the Court on the questions presented in these two cases is fundamentally one of approach upon which the members of the Court are in irreconcilable conflict. The members separate themselves into two formidable camps; the line is clearly drawn between those members of the Court who cling to the liberal interpretation of the Constitution and those who adhere to the doctrine of stare decisis. The Minnesota decision is one of the much criticized five to four decisions of the Court, and like other such decisions it presents a problem of construction on which one's opinion often follows one's economic views. The Worthen case presents the same division in the membership of the Court except that there it is in a special concurrence instead of a dissent. Mr. Chief Justice Hughes delivered the opinion of the Court in both cases, and Mr. Justice Sutherland delivered the dissenting opinion of the Minnesota case and the specially concurring opinion of the Worthen case. Two quotations from the respective opinions will suffice to show the vast difference with which the two groups of Justices approached the problems

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[4] "In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right." Penniman's Case, 103 U. S. 714, 26 L. ed. 602 (1880).

Justice Taney said, "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of a contract and the right of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceeding with new conditions and restrictions, so as to make the remedy hardly worth pursuing." Bronson v. Kinzie, 1 How. 311, 317, 11 L. Ed. 143, 145 (1843), approved in Curran v. Arkansas, 15 How. 304, 14 L. Ed. 705 (1853).

[5] "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." Home Building & Loan Association, *supra*, 78 L. Ed. 429.

raised by the two cases. Mr. Justice Hughes says, "If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with conditions and out look of their time, would have placed upon them, the statement carries its own refutation."[6] Mr. Justice Sutherland replies, "A provision of the Constitution, it is hardly necessary to say does not admit of two distinctly opposite intepretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the releif of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economical or financial emergency, it is but to state the obvious to say that it means the same today."[7]

The Minnesota case not only embraces within the terms of a contract the lex loci contractus but also what it terms to call, "essential attributes of sovereign power"[8] and under this heading by means of the police power it justifies the Minnesota statute. The conservative Justices reject the theory that an emergency can justify, even under the police powers a nullification of the Constitutional provisions because they contend that the "acceptance of such a view takes us beyond the fixed and secure boundaries of fundamental law into a precarious fringe of extra constitutional territory in which no real boundaries exist."[9] The whole doctrine upon which the Court proceeded in the Minnesota case, and in its attempts to justify the Worthen case, is one which has been troubling lawyers and judges in this country for some time and has given rise to such epithets as, "Legislation by the Judiciary," and "Is ours a government of laws or of men?"

In the Minnesota case the Court speaks of the police power as the reserved power of the states. It is depicted as a mighty force which is held in abeyance only to be turned loose when the circumstances demand. When the emergency exists for the use of this great reserved power it is omnipotent, overcoming the limitations of the contract clause as well as other clauses of the Constitution that might be in its path.[10] The Court justified the use of this power in the Minnesota case but when it said, "The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects,"[11] absolutely no criteria were furnished the legislatures of the respective states in framing emergency legislation. Both the Minnesota case and the Worthen case are great examples of expansion of our Constitution by judicial interpretation.

JOHN E. STONE

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[6]Chief Justice Marshal said, "We must not forget that it is a Constitution, we are expanding, a Constitution intended to endure for ages to come and consequently to be adopted to the various courses of human affairs." M'Culloch v. Maryland, 4 Wheat, 316, 407, 4 L. ed. 579, 601 (1819).

[7]Chief Justice Taney said, "While the Constitution remains unaltered it must be contrued now as it was understood at the time of its adoption . . . as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers." Dred Scott v. Sanford, 19 How. 393, 15 L. Ed. 691, 710 (1857).

[8]Home Building & Loan Association v. Blaisdell, *supra,* 78 L. Ed. 427.

[9]Worthen v. Thomas, 78 L. Ed. 1348.

[10]"While emergency does not create power, emergency may furnish the occasion for the exercise of power." Home Building & Loan Association v. Blaisdell, *supra,* 78 L. ed. 422.

[11]Home Building & Loan Association v. Blaisdell, *supra,* 78 L. ed 429.

INSURANCE—COLLUSIVE FRAUD AVOIDS POLICY.

Applicant for insurance in his application stated that he was in good health and free from any and all diseases, ailments, or afflictions, while, at the time, he was actually undergoing medical treatment for chronic dilation of the heart due to valvular obstruction. Insurer's medical examiner filled out the medical report showing applicant to be in good health although he personally had treated applicant for this heart trouble and knew that the disease was such as to render the applicant ineligible to an honest policy of insurance. After death of the insured the beneficiary sues to recover on the policy of insurance. HELD: The collusive fraud between the insured and insurer's medical examiner revoked the contract of agency so as to relieve insurer of liability, regardless of examiner's misrepresentations. *Preferred Life Assur. Soc. v. Thompson,* .....Miss....., 155 So. 188 (1934).

Although this is a case of first impression in Mississippi courts, the federal courts have for some time followed a rule similar to that laid down in the instant case. In the case of *Mutual Life Ins. Co. v. Powell,*[1] a suit exactly like the principal case in every material particular, the United States Circuit Court of Appeals for the 5th Circuit held that the fact that the medical examiner was the agent of the insurance company did not charge it with knowledge of the facts known to him and that the collusive fraud of the insurer's agent and the insured avoided the policy. Other recent decisions have further strengthened this as the federal rule.[2]

In rendering the decision in the instant case and in laying down the rule that collusion between insurer's agent and insured in an intentional attempt to defraud the insurance company vitiates and avoids the policy of insurance, the Mississippi Supreme Court thoroughly analyzed the relationship between all of the interested parties. The fraud of insurer's medical examiner alone would not release the insurer from liability or render the policy void, because it is estopped to set up as false that which its own agent has recited or sworn to be true.[3] Good faith on the part of an applicant for an insurance policy entitles him to the issuance of a valid and legally enforcible policy, even though the insurer's agent may have been guilty of fraud or may have made mistakes in preparing the application for insurance.[4]

This rule governing the fraud or mistakes of insurance agents is based on sound principles of equitable justice; in cases in which the insurer's agent acted dishonestly the insurance company cannot claim that it has been wronged or deceived, and to permit it to issue a policy and take the benefits of the contract, knowing at the time that it is not bound thereby, and afterward to avoid liability thereon, upon the ground that something existed or did not exist of which the company or its agents was fully aware at the time the contract was made, would be repugnant to that sense of justice and morality which is and should be inculcated by law.[5]

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[1]Mutual Life Insurance Co. of New York v. Powell, 217 F. 565 (C. C. A. 5th 1914).

[2]Keeton v. Jefferson Standard Life Ins. Co., 5 F. (2d) 183 (C. C. A. 4th 1925).
Stipcich v. Metropolitan Life Ins. Co., 8 F. (2d) 285 (D. C., Ore. 1925).
Fountain & Herrington v. Mutual Lift Ins. Co. of New York, 55 F. (2d) 120 (C. C. A. 4th 1932).

[3]National Live Stock Ins. Co. v. Simmons, 62 Ind. App. 15, 111 N. E. 18 (1916).
North American Accident Ins. Co. v. Trenton, 99 S. W. 740 (Tex. 1907).
Moore v. Prudential Casualty Co., 156 N. Y. S. 892 (1916).

[4]James Rivara v. Queen's Insurance Co., 62 Miss. 720 (1885).

[5]*Ibid.*
WOOD on FIRE INSURANCE, 279, 601, 843.

"For the insured successfully to invoke an estoppel, which is essentially equitable in its nature, he must have exercised good faith in his dealings with the insurer."[6]— This quotation from *Michigan Law Review,* page 115, succinctly states the *ratio decidendi* of the principal case. The petitioner for estoppel must have clean hands, it is said.[7] Since, in the principal case, the insured was guilty of an untruth in his statements, which were incorporated into the policy as warranties, it may reasonably be said that his beneficiary is in no position to work an estoppel against the insurer, and that the express letter of the contract of insurance should govern.[8] It has been frequently so held when the agent of the insured had knowledge of the falsity or acted in collusion with the insured.[9]

Upon analysis and segregation into groups, it is found that a different rule governs the insurer's ability in each of the three situations involving fraud in the application for an insurance policy: (1) if the insurer's agent acted dishonestly in the interest of himself, the insurer, or the insured, the insurer is estopped to declare the policy void, because its own agent committed the fraud;[10] (2) if the insured attempted to defraud the insurer by making false or untrue statements in his application for insurance, his fraud vitiates and voids the policy *ab initio;*[11] and (3) if both the insurer's agent and the insured collude and conspire to defraud the insurer, the collusion automatically terminates the agency relationship and releases the insurance company from liability on the contract of insurance.[12]

EBB. J. FORD

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[6]26 MICH. L. R. 115.
[7]Mudge v. Supreme Court, I. O. F., 149 Mich, 467, 112 N. W. 1130 (1907).
Leisen v. St. Paul Fire & Marine Ins. Co., 20 N. D. 316, 127 N. W. 837 (1910).
[8]*Ibid.*
[9]*Ibid.*
[10]National Live Stock Ins. Co. v. Simmons, *supra.*
North American Accident Ins. Co. v. Trenton, *supra.*
[11]Atlantic Life Ins. co. v. Hoefer, 66 F. (2d) 464 (C. C. A. 4th 1933).
Shapiro v. Metropolitan Life Ins. Co., 114 N. J. Eq. 378, 168 Atl. 637 (1933).
Pellon v. Connecticut General Life Ins. Co., 168 Atl. 701 (Vt. 1933).
[12]Mutual Life Insurance Co. of New York v. Powell, *supra.*
Satz v. Mass. Bonding and Ins. Co., 243 N. Y. 385, 153 N. E. 844 (1926).

MASTER AND SERVANT—SUPERIOR SERVANT RULE—DUAL CAPACITY OF FOREMAN.

The plaintiff, a servant of the defendant, was injured by an act of the foreman in negligently turning a gas valve, whereby foreign particles were blown into the face of the former. HELD: The defendant was not liable for the negligence of its foreman, for the latter was acting as a fellow-laborer, and not in his supervisory character. *Harper v. Public Service Corp. of Miss.,* .....Miss....., 154 So. 266 (1934).

The court states that under the doctrine of dual capacity which is recognized in Mississippi the master is liable only for the acts of his foreman when exercising supervisory authority, and not for those acts of the foreman when engaged in detailed and delegable work of the laborer.[1]

In many states the doctrine of dual capacity has been entirely rejected, this upon the reasoning that since the master would be liable had the foreman or superior agent expressly directed a servant under his control to do the particular

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[1]Accord: Gann v. Nashville C. & St. L. R. Co., 101 Tenn. 380, 47 S. W. 493 (1898); Chicago & A. R. Co. v. May, 108 Ill. 288 (1884); Crispen v. Babbit, 81 N. Y. 516, 37 Am. Rep. 521 (1880).

negligent act which proximately resulted in an injury to another servant, there is no substantial distinction when the foreman himself does the negligent act, executing himself his own directions. The strength of this reasoning is not to be denied, and it is even more apparent that the practical administration of the law under that rule would be far easier and simpler than under the doctrine of dual capacity; but since the decision of *Lagrone v. Mobile & O. R. Co.*,[2] our state has been consistently aligned with those of the latter doctrine, which is that the master is liable only for those acts of the foreman or superior agent which are official or managerial acts, those done by him in actual exercise of his supervisory authority, and not for those which pertain to the duties of labor of a workman, those done by him when engaged then and there in the manual or operative work of a laborer.[3]

The case of *Lagrone v. Mobile & R. Co., supra*, is a leading Mississippi case on this subject, and the decision and opinion in this case have been accepted and applied by Mississippi courts in cases of this nature. The rule laid down in that case was that a section master and a laborer under him, who are engaged in common service, are fellow servants; and the company is not liable to the latter for an injury caused by the negligence of the former while so engaged. Although the court reached its decision by an application of the dual capacity theory, yet it admitted that the reasoning followed by so many states rejecting this theory is strong.

In the case of *Barron Motor Co. v. Bass*,[4] which is cited as authority for the case at bar, the court said that a foreman or vice-principal employed by a garage, in placing a drawing knife on a table, before assisting an employee in a welding operation, was not a fellow servant so as to absolve the master from liability for injuries to the employee from the knife. At a glance, the statement of the court would seem to hold the case contra to the case at bar, rather than in accord; but there is a distinction here. The foreman did assume the role of a fellow servant when he began assisting the welder, but his negligent act of placing the knife on the table was done while in the capacity of a foreman, and before he assumed the capacity of a fellow servant in the welding operation; thus, the master was liable for the negligent act of its foreman. The master was under an obligation and duty to provide a safe place of work for the employees.

In the case of *Gwin v. Carter*,[5] the court held that a foreman of a construction company in direct control of the servant at the time the former assaulted the servant was not a "fellow servant," and therefore the employer was liable for assault.

The court, in the case of *Hercules Powder Co. v. Hammack*,[6] held that in an action for personal injuries, which resulted from the negligence of a fellow servant, the injured party could not recover against the employer.

"The element that must be considered primarily in determining the liability of the employer for the acts of his superior servant is the nature and character of the power of control, direction, and superintendence, with which the employer has clothed the actor. . . . An increasingly large number of cases emphasize the fact or declare in terms that where the employer confers on another power to control, direct, and superintend, persons who are engaged in the business, the director or superintendent, or whatever he may be termed, becomes the employer's representative for whose acts and omissions the employer is accountable. He is not

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[2]67 Miss. 592, 7 So. 432 (1890).
[3]Opinion of Supreme Court in principal case.
[4]167 Miss. 786, 150 So. 202 (1933).
[5]158 Miss. 196, 129 So. 597 (1930).
[6]145 Miss. 304, 110 So. 676 (1926).

a fellow servant within the fellow-servant doctrine. Indeed in some jurisdictions, it has been declared by statute that a servant or employee, who has the authority to direct any other employee in the performance of any duty of such employee, is a vice-principal, and not a fellow servant."[7]

The first case in the United States which declared the fellow-servant rule was *Murray v. South Carolina R. R. Co.*,[8] in which a fireman was injured by the negligent acts of the engineer in running a train over a horse, and causing a wreck thereby. The court held that the railroad was not liable for injuries to a servant caused by the negligence of a fellow servant. The rule was adopted, according to the case, for the purpose of promoting public security. The view of the case established the rule that every person who enters into the service of the railroad company takes up himself the risk of all injuries he may sustain from the ignorance of the servants of the company, and the security of the public requires adoption of this principle.

The cases of *Murray v. South Carolina R. R. Co., supra,* and *N. O. J. & G. N. R. R. Co. v. Hughes*[9] were cited as authority in *Lagrone v. Mobile & O. R. Co.*[10] by the Mississippi court. The principles therein contained were new to this state, and had the effect of extending the fellow-servant rule. However, it must be noted that these cases were not directly authority for *Lagrone v. Mobile & O. R. Co.,* for the latter was really decided on the question of policy.

A considerable body of authorities can be produced for the view that a vice-principal acts in a representative capacity as to what he does while assisting to do the work which he is appointed to supervise.[11] Let us turn to the decisions of other states upon practically the same facts, but different holdings.

In the case of *Shumway v. Walworth & N. Mfg. Co.* [12] machinery was started by a superintendent after an obstruction had been removed by the plaintiff, whereby the latter was injured, and the defendant was held liable on the broad ground that a superintendent "stands in the place of the master in whatever he does in furtherance of the business and operations he has in charge. In the performance of this act, the superintendent or foreman was a representative of the master rather than a fellow servant."

In the case of *Berea Stone Co. v. Kraft,*[13] where the injury was caused by using hooks for hoisting a large stone which was so soft that chains should have been passed round it, the court says: "The fact, if it be true, that Stone's negligence in fastening the hooks to the stone to be raised may have caused the injury, and that he was then performing the duty of a common workman, and not strictly pertaining to the duties of a foreman, in nowise relieves the company from liability. If the act done by him had been done under his direction, as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person."

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[7] 18 R. C. L., 218, 748.
[8] 1 McMullen 385, 11 S. C. Reports 166 (1841).
[9] 49 Miss. 258 (1871).
[10] *Supra,* note 2.
[11] Accord: Purcell v. Southern R. Co., 119 N. C. 728, 26 S. E. 161 (1896); Nix v. Texas P. R. Co., 82 Tex. 473, 185 S. W. 571 (1891); Sullivan v. R. D. Wood & Co., 43 Wash. 259, 86 Pac. 629 (1906).
[12] 98 Mich. 411, 57 N. W. 251 (1894).
[13] 31 Ohio St. 287, 27 Am. Rep. 510 (1877).

The ruling in the case of *Consolidated Coal Co. v. Fleischbein*[14] was that a pit boss in a mine, by merely undertaking to drive a mule hauling four loaded cars from the parting or switch to the bottom of the shaft, does not abdicate his position as vice-principal, and become the fellow servant of the driver.

The case of *Strode v. Conkey*[15] lays down the opinion that "though the negligent act be that of the foreman while himself engaging in the work of those employed under his charge, yet the fact does not cause him to lose his character as vice principal."

"There is no logical distinction between the act of a vice-principal in negligently ordering a servant to do an imprudent thing and in doing the thing himself."[16]

In *Hudson v. Missouri P. R. Co.*,[17] where a section foreman injured a laborer with a pick which he was using to pull a tie from under the rails, the court said: "In this case we have the unusual fact that the injury was directly inflicted by the foreman himself while engaged in the work as a co-laborer with the plaintiff. Does this fact alter the relation of the parties, or interfere with the master's liability? Our opinion is that it does not."

Under an Arkansas statute, it was held that the superintendent or foreman of a repair gang of a railroad is not a mere fellow servant while riding on a hand car from one place to another.[18]

The ruling of the case of *Suderman & Dolson v. Kriger*[19] is that where the negligence of a vice-principal injuries an employee to whom he sustains such relation, the master is liable even though the act he is performing at the time falls within the ordinary duties of a fellow servant.

The case of *Tendall v. Great Northern Ry. Co.*[20] is likewise in accord with the preceding case. While a wrecking crew was engaged in raising a box car, the plaintiff was directed by the foreman to take a position at one end of the car, which remained fastened when power was applied, and to pry up with a pinch bar. The foreman assisted with another bar, when the car suddenly swung toward the plaintiff and caught his foot under the bar, whereby the latter was injured. HELD: The foreman was a vice principal.

The main difficulty in the dual-capacity rule is the decision as to when a foreman is acting in the capacity of a fellow servant. There is no set rule or standard, and consequently the various courts differ when deciding as to just what constitutes dual capacity; thus, we have room for various and inconsistent holdings.

The Mississippi court has sought to exonerate and aid the employer as much as possible, and to expand and extend the fellow-servant rule. Mississippi and the other states in accord have adopted these principles as the better policy, and this has been made possible for the reason that the decisions are largely questions of fact rather than of law.

WELLS W. WOODY, JR.

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[14]207 Ill. 593, 69 N. E. 963 (1904).
[15]105 Mo. App. 12, 78 S. W. 678 (1904).
[16]Donnelly v. Aida Min. Co., 103 Mo. App. 349, 77 S. W. 130 (1903).
[17]50 Mo. App. 300 (1892).
[18]Haworth v. Kansas City Southern R. Co., 94 Mo. App. 215, 685 S. W. 111 (1902).
[19]Court of Civ. App. of Tex., 109 S. W. 373 (1908).
[20]113 Minn. 473, 130 N. W. 22 (1911).

BULK SALES STATUTE—FIXTURES—"STOCK OF MERCHANDISE."

One Breland owned and operated an automobile filling station. He sold the station and the merchandise contained therein. In this proceeding by the creditors of Breland to recover the value of the articles sold the court HELD: that fixtures used in connection with the station were a part of the owner's "Stock of Merchandise" within the Bulk Sales Statute. *B. F. Goodrich Rubber Co. v. Breland; Hood Tire Co. v. Same*: .....Miss....., 154 So. 303, (1934).

The instant case is interesting from the standpoint of the extent to which our court has gone in the judicial construction of a legislative enactment for the purpose of making it conform to the court's notion of what best subserves the public interests. The term "fixtures" is not included within the Bulk Sales Statute, but it is virtually written therein by judicial interpretation. The statute used the term "stock of mechandise."[1] The court has found that "fixtures" are included within the term. The case of *Walton v. Walter Fishing Co.*,[2] is relied upon by the court. That opinion in part is as follows: "The purpose of the Bulk Sales Act was to prevent fraudulent sales by merchants to defeat creditors of the property in their places of business upon which their creditors principally extend credit. . . . The word "merchandise" in the statute should be given broad enough meaning to cover the evil the statute sought to remedy. To limit the statute strictly to goods kept for sale would, in a large measure, defeat its purpose."

Mississippi and one other state, namely, Georgia stand alone upon this decision. The Georgia court has held in *Parkham v. Potts-Thompson Liquor Co.*,[3] that the phrase "stock of goods, wares and merchandise" as used in the statute includes such articles as bar fixtures, safe, desks, cash registers, cigar cases, pool tables, and items other than liquor used in connection with the retail liquor business. Whereas some nineteen states hold the opposite view, that is, that fixtures are not included within the term "stock of merchandise."[4] These states have statutes similar to that in Mississippi. It will be found that the remaining states that have decisions upon the point here considered include the term fixtures within the Bulk Sales Statute in addition to the term "stock of merchandise."[5] Obviously they are not authority for the instant case.

Now, merchandise in the general sense of the term is that which is bought and sold in the ordinary course of business.[6] Those fixtures used in connection with a business are articles used by the merchant for the purpose of aiding him in buying, selling, storing, etc. of the merchandise. They are not by any conceiveable stretch of the imagination a part of the merchandise of the business. Gas pumps and air compressors used in a filling station are not bought and sold as merchandise. The very clearness of the distinction between the two types of property would seem to be authority for the assumption that had the legislature intended both to be included within the protection of the statute it would have expressly done so. One typical case out of the great number of cases holding that fix-

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[1]MISS. CODE ANN., 1930, 3353.

[2]146 Miss. 291, 111 So. 364 (1927).

[3]127 Ga. 303, 56 S. E. 460 (1907).

[4]Arizona, Connecticut, Idaho, Illinois, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New York, Oklahoma, Oregon, Utah, West Virginia, Tennessee, Wisconsin, and South Carolina.

[5]Texas, Michigan, Arkansas, Louisiana, Indiana, and Pennsylvania.

[6]Words & Phrases, "Merchandise."

tures are not included within the term merchandise states that "The Bulk Sales Law, being in its character penal, in derogation of the common law, and of the right to alienate property without restriction, should be strictly construed."[7]

It is most difficult to perceive the authority in the Bulk Sales Statute for this decision.

LOUIS HENGER

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[7]Missos v. Marks, (Wis.) 197 N. W. 196 (1924).
For further discussion of the Bulk Sales Statute see 1 MISS. LAW JOURNAL 442 and 4 ALABAMA LAW JOURNAL 336-7.

NEGLIGENCE—PROXIMATE CAUSE—INJURY OCCURING WHILE VIOLATING SPEED STATUTES.

A bus of the defendant corporation met the plaintiff's car on a graveled highway throwing a rock through the windshield of the plaintiff's car and injuring her eye. HELD: The defendant bus company was liable in damages where injury resulted from excessive speed. Defendant should reasonably have anticipated throwing rocks. *Teche Lines Inc., v. Bateman,* 162 Miss. 404, 139 So. 159 (1932).

The Mississippi court in this case did not quote or refer to any cases in substantiation of its holding, but based such holding on an interpretation of section 5569 of the MISS. CODE ANN. (1930).

In the case at bar the evidence adduced by the plaintiff showed that the bus of the defendant company was traveling at an excessive speed, around 50 or 55 miles and hour, when it met the car of the plaintiff, throwing as it passed a rock through the windshield of the plaintiff's car. The testimony of the bus driver was that the bus was equipped with a governor which would not allow the bus to run over forty miles per hour, that he was driving with due care, that he did not even know that the bus had thrown a rock through the plaintiff's windshield, and that he did not learn of it until some time later.

The court in the instant case cited the statute of this state (Sec. 5569)[1] as a basis for their holding. The statute is as follows:

> "Speed limits for motor vehicles.—No person shall operate a motor vehicle on a public highway, or street, avenue, or alley of any city, town or village in this state at a greater rate of speed than is reasonable and proper, having due regard to the traffic and use of the highway; or so as to endanger the life or limb of any person or the safety of any property; or in any event on any public highway where the territory contiguous thereto is closely built up, at a greater rate of speed than twenty miles per hour, or elsewhere in any municipality at a greater rate of speed than twenty miles per hour, or elsewhere outside of any municipality at a greater rate of speed than forty miles per hour, but trucks shall not in any event operate at a greater rate of speed than thirty miles per hour . . . ."

The Mississippi court in substantiation of its holding gives the following reasoning:[2]

> "A person traveling on a gravel highway is bound to know that missles are liable to be hurled with more or less violence according to the speed and weight of the car, and are bound to know that such rocks may cause injury

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[1]MISS. CODE ANN. 1930.
[2]Teche Lines, Inc., v. Bateman, 162 Miss. 404, 139 So. 159 (1932).

> to others. Where such violation of a specific statute causes injury, and where such injury can reasonably be anticipated, or some injury can be anticipated, from such violation, liability for the injury accrues."

It seems that the court here is straining a point when it holds that the violation of the speed statute of Mississippi is the promixate cause of the injury. Certainly, it cannot be seriously contended that an automobile cannot throw rocks when it is traveling at forty miles per hour and within the speed limit. The evidence of the plaintiff in this case is to the effect that she was going around fifteen miles per hour when the bus met her at a speed of around fifty miles per hour. In such a case as this, the speed of the cars does not necessarily mean that the rock struck with an approximate force of sixty-five miles per hour. A car going fifty miles an hour might throw a rock at that speed, but it is a matter of common knowledge that many rocks are thrown to the side of the car with just enough force to describe a short arc, and were it not for the speed of the approaching car, oftentimes no damage would be done. Thus it would seem that the speed of the car is not the proximate cause of the injury, for just as much injury can be done when neither car is exceeding the speed limit.

The Mississippi court further says:[3]

> "It may be safely assumed that a person traveling the highway assumes the risk incident to travel in a reasonable and lawful manner, but when a person exceeds the speed limit allowed by law, and, as a result of such excessive speed, injury is inflicted upon another using the highway, such party is liable for the injury occasioned thereby."

It is suggested here that the condition of the Mississippi roads, namely, that nearly all of them are graveled, would support the proposition that injury from flying rocks is a risk incident to travel on such roads. Of course, it is not contended that negligent and reckless driving should be excused in any event, but it is urged that the courts of this state should take into consideration the condition of the roads in Mississippi when they are deciding a case involving such roads.

The case here is not restricted to bus companies or trucks, but applies to all motorists. The court said that it is immaterial that numerous suits may be filed and may be hard to defend, for that is a consideration for the Legislature and not for this judicial body. On the other hand, it would seem that this question is one for the judiciary, for in the present case this court bases its holding on the Mississippi speed statute.

Such suits will be hard, if not impossible, to defend, for defendants will have little, if any, means of knowing whether or not they caused the injury complained of. It appears, therefore, that this problem is one for the judicial department of our state, and it is contended that such harsh interpretations of the statute should not be made considering the condition of the roads of Mississippi.

In the case of *Burkes v. Lieberman,*[4] the car of the defendant was traveling along the road, at what the plaintiff said was excessive speed, when the car hit a pile of stones in the road, throwing them into the air, hitting the plaintiff and injuring him. In a *Per Curiam* decision, the court held that the testimony did not show negligence of the driver and the plaintiff was not allowed to recover.

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[3] *Ibid.*
[4] 218 N. Y. S. 593, 157 N. E. 865 (1927).

Cases of other jurisdictions hold that plaintiffs can recover on an accident policy for personal injuries when struck by a rock thrown by some other car.[5]

In the case of *Bowling Green-Hopkinsville Bus Co., v. Edwards,*[6] the plaintiff was a passenger on a bus and a rock or some other missle hit her in the eye, just as a truck was passing the bus head on. The court held both the bus and truck companies liable. There is a distinction in that case and the one at bar, however, for in this case the bus was traveling over a closed road of new crushed rock by special permission, and the passing truck was engaged in carrying pipe for the road. In the case at bar, the accident happened on a United States highway[7] open to the public.

A Mississippi case somewhat analogous to the one at bar is that of *Rowlands v. Morphis.*[8] In that case the defendant's car, traveling at a speed of over forty miles per hour, was passing a truck with a trailer when the truck made a sudden left hand turn and there was a collision and the plaintiff was injured. The court held that the unlawful speed of the automobile must be the proximate contributing cause of the injury to make unlawful speed an element of liability. The court in that case said:

> "In order for the unlawful speed to be an element of liability for the injury inflicted by an automobile while being driven at an unlawful speed, it must appear that the unlawful speed was a proximate contributing cause of the injury. In other words, if the injury would have been inflicted though the automobile was then being driven at a lawful speed, there is no liability therefore, in the absence of other acts of negligence that proximately contributed to the injury."

Certainly it cannot be seriously contended that the accident in the case at bar could not have happened if the bus had been going at the lawful rate of forty miles per hour, for it would seem that the speed of the car does not necessarily show at what speed rocks will be thrown. According to a statement from our own court, quoted above, there is no liability if the injury would have been inflicted while the automobile was being driven at a lawful speed. There is no evidence whatsoever of any negligence on the part of the bus driver other than that of speed in excess of that provided by statute.

It is submitted, therefore, that the courts of this state should be reluctant to impose any such burden on motorists by such a construction of our statute governing speed. It seems that injury caused by missiles thrown by automobiles not driven in a reckless manner should be considered in the light of a risk incident to travel on Mississippi roads.

WILLIAM A. BACON

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[5]Maness v. Life & Casualty Ins. Co., of Tenn., 161 Tenn. 41, 28 S. W. (2nd) 369 (1930). Kennedy v. Maryland Casualty Co., of Baltimore, Md., 26 F. (2d) 501 (1928).

[6]59 S. W. (2d) 584 (1933).

[7]Another case somewhat similar to the one quoted above is that of Stephenson v. Smith Motor Coach Co., 47 S. W. (2d) 932 (1932), in which case a truck with a trailer passed from behind a bus on which the plaintiff was riding, throwing a rock through the windshield of the bus injuring said plaintiff. The court held that the bus company was not liable for they were not negligent in any way.

[8]158 Miss. 662, 130 So. 906 (1930).

CONSTITUTIONAL LAW—DUE PROCESS—LIABILITY OF STATE HIGHWAY COMMISSION IN TORT

Appellant, in constructing a highway across a creek, negligently constructed a ditch which resulted in the overflow of the appellee's farm. HELD: The Court, in construing sections 4998[1] and 5006 (c)[2] of the Mississippi Code of 1930, decided that the state highway commission is not liable for the injury. *State Highway Commission v. Knight,* .....Miss....., 154 So. 263 (1934).

The Court, in this case, clearly follows the weight of Mississippi authority. In the cases of *Stephens v. Beaver Dam District,*[3] *State Highway Commission v. Gully,*[4] and *Stewart v. State Highway Commission,*[5] it was held that, in the absence of a valid statute imposing liability therefor, a public corporation is not liable for the negligence of its officers, agents, or employees, and that a general authorization to sue a governmental subdivision or agency does not create liability. The latter two cases specifically hold that section 5006 (c) of the Mississippi Code of 1930, relied on by the appellee, does not create any liability.

The rule is well settled in this country that a state, in the absence of a statute, cannot be held accountable for its tortious acts.[6] This immunity from suit is extended to agencies of the state, and is almost universally extended to highway districts and commissions.[7] Statutes authorizing suits against the state, since they are in derogation of its sovereignty, are strictly construed, and the waiver must be clear and unambiguous; otherwise the state would be forced to litigate with its own citizens as to whether it had abnegated its immunity.[8] It is quite generally held that the power given to a state agency to sue and be sued carries with it no liability of a non-contractual nature.[9] In the case of *Longstreet v. Mecosta County,*[10] a directory statute analagous to section 4998 of the MISSISSIPPI CODE ANNOTATED of 1930, relied on by the appellee, was held not to impose liability on the highway commission for failure to observe the directions laid out in the statute.

The question of the immunity of states and their agencies is growing increasingly important because of the increase in corporate functions of government, and, although the law as to their immunity is well settled by a long line of decisions, grave doubt has been cast upon its wisdom. Professor Borchard brings a severe indictment against the whole theory of immuntiy in his article *"Govern-*

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[1]"The Authorities constructing such highway under the authority as is provided for in this section, shall use diligence to protect growing crops and pastures, and to prevent damage to any property not taken."

[2]"The state highway commission shall be a body corporate, and as such may sue and be sued, plead and be impleaded, in any court of justice having jurisdiction of the subject matter of any such suit."

[3]123 Miss. 884, 86 So. 641 (1921).

[4]167 Miss. 631, 145 So. 351 (1933).

[5]166 Miss. 43, 148 So. 218 (1933).

[6]59 C. J. 194; Carpenter v. Atlanta & C. A. L. Ry. Co., 184 N. C. 400, 114 S. E. 693 (1922); Hans v. Louisiana, 134 U. S. 1, 33 L. Ed. 442, 10 Sup. Ct. 504 (1889).

[7]Mullinax v. Hambright, 104 S. E. 309 (S. C., 1920); Kilberg v. Louisiana Highway Commission, 8 La. App. 441; Prince William County v. Manuel, 118 Va. 716, 88 S. E. 54 (1916).

[8]26 A. & E. Enc. of Law 487.

[9]13 R. C. L. 309; Kilberg v. Louisiana Highway Commission, *supra*; Hopkins v. Clemson College, 77 S. C. 12, 57 S. E. 551 (1909).

[10]228 Mich. 542, 200 N. W. 248 (1924).

ment Liability in Tort."[11] The best argument for immunity is given by the court in the case of *Kilberg v. Louisiana Highway Commission.*[12] It says: "the commission would be eventually deprived and dispossessed of the fund which is necessary for it to exercise its governmental functions and which is dedicated by the constitution to that special purpose. To so hold would be to recognize that the usefulness of the commission can be destroyed and the purpose of its existence frustated through the fault and negligence of the persons appointed to superintend the work necessary to accomplish the legal ends of its existence." There seems to be no more reason, however, why a public corporation should not be held liable in tort than a similar private corporation. The people of a state have virtually the same control over their officers as the stockholders of a private corporation have over theirs. In the great majority of civil law countries, no such strict rule of immunity is applied,[13] and their public corporations seem to very satisfactorily fulfill the functions for which they were created. Under the civil law system, the question of liability is often settled in the courts, under the common law system, the question of liability is often settled in the legislative chambers through private bills. Even this inadequate method of relief is sometimes greatly hampered by constitutional provisions, such as prohibitions on the power of the legislature to make gifts. Such a constitutional provision has been held to invalidate an act of the legislature, appropriating money as compensation for an injury already received.[14] The theory of state immunity originated in the maxim "the King can do no wrong." The anomaly of applying this maxim to our States is clearly pointed out by Professor Borchard in his article.[15]

If there is to be a mitigation of the rule of strict immunity of states or state agencies from suis in tort, it is probable that it will come from the federal courts. The United States Supreme Court, in deciding the case of *Hopkins v. Clemson College,*[16] took a step in the direction of limiting the functions of a state agency which the law will deem governmental in character. In that case, suit was brought by the appellant against the Clemson Agricultural College for building a dyke and flooding his farm lands. The fee of the land in question belonged to the State of South Carolina, subject to certain conditions. The legislature of South Carolina had chartered Clemson Agricultural College to use this land for educational purposes, and had made the board of trustees of said college a body corporate with power to sue and be sued. The Supreme Court of South Carolina held that the college could not be sued for its act of flooding the appellant's land.[17] On writ of error to the United States Supreme Court, the latter held that such a public corporation could not avail itself of the State's constitutional immunity so as to damage or take property without due process of law. The reason given for the holding was that the college was acting in a corporate capacity and not in a governmental capacity. The court did not discuss the question of what was necessary to render a function governmental. It was not clear from the report of the case whether the land protected was being used to teach agriculture, or was merely being used to produce revenue. The immunity

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[11] 34 YALE LAW JOURNAL 1.
[12] 8 La. App. 441; Cited in Varnado v. State, 136 So. 771 (1931).
[13] DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, Chapter 12.
[14] Bourn v. Hart, 93 Cal. 321, 28 Pac. 951 (1892).
[15] 34 YALE LAW JOURNAL 4.
[16] 221 U. S. 636, 55 L. Ed. 890, 31 S. Ct. 654, 35 L. R. A. (N. S.) 243 (1911).
[17] Hopkins v. Clemson College, 77 S. C. 12, 57 S. E. 551 (1909).

extended to Clemson College by the South Carolina Supreme Court is extended, in almost every instance to similar state educational institutions by the courts of the other states.[18] The Clemson College case seems to indicate that there are limitations to a state's immunity contained in the federal constitution, and that these limitations are more narrow than any heretofore recognized by our state courts. It seems to open the way for the federal courts to balance the eleventh and fourteenth amendments, in cases of a suit against a state or state agency, and determining, in a number of cases where immunity from suit is recognized by the state courts, that the fourteenth amendment prevails over the eleventh because of the peculiar character of the governmental agency invloved.

THOMAS Y. MINNIECE

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[18]Green v. New York, 107 Misc. 557 (N. Y. S. C., 1919); Abston v. Waldon Academy, 118 Tenn. 24, 102 S. W. 351 (1906); Alabama Girls Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114 (1905); Same v. Addler, 144 Ala. 555, 42 So. 116 (1905); Oklahoma A & M College v. Willis, 6 Okla. 593, 52 Pac. 921 (1898).